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Chapter 3
International Criminal Law

A. EXTRADITION AND MUTUAL LEGAL ASSISTANCE

1. U.S.-Bermuda Mutual Legal Assistance Agreement

On September 26, 2011, the Senate provided its advice and consent to ratification of the Treaty between the Government of the United States of America and the Government of Bermuda relating to Mutual Legal Assistance in Criminal Matters, signed at Hamilton on January 12, 2009. S. Treaty Doc. No. 111-6 (2010). The Senate provided its advice and consent subject to a declaration that the treaty is "self executing." 157 Cong. Rec. S5339 (Sept. 6, 2011).[*] See *Digest 2010* at 38-39 for background on the treaty and its similarities to other mutual legal assistance treaties ("MLATs").

2. Criminal Case Implicating the U.S. Extradition Treaty with Thailand

See discussion of *United States v. Siriwan*, in section B.4.d., *infra*.

3. Extradition of Fugitive Alleging Fear of Torture

On February 28, 2011, the U.S. Court of Appeals for the Ninth Circuit granted the government's petition for rehearing en banc of an appeal from the district court's 2009 grant of habeas corpus relief in *Trinidad y Garcia v. Benov.* 636 F.3d 1174 (9th Cir. 2011). Trinidad argued that his extradition to the Philippines would violate the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"). For previous developments in the case, see *Digest 2008* at 57–64, *Digest 2009* at 50–51, and *Digest 2010* at 45-49. The United States filed its en banc brief in the Court of Appeals for the Ninth Circuit on April 1, 2011, arguing that the Secretary of State's determination to extradite was not justiciable. The U.S. brief, excerpted below (with footnotes and citations to the record in the case omitted), is available in full at www.state.gov/s/l/c8183.htm.

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There should be no doubt that, in light of the Torture Convention and its implementation through the FARR Act [the Foreign Affairs Reform and Restructuring Act of 1988] and State Department regulations, the Secretary of State will not surrender a fugitive for extradition if torture is more

[*] Editor's note: The treaty entered into force April 12, 2012.

likely than not to occur in the receiving state. We are thus ***not*** arguing that the Secretary has the discretion to surrender a fugitive who likely will be tortured, even if particular foreign policy interests at the time might be served.

This case is therefore not about whether the United States may surrender someone for extradition when it believes he is more likely than not to be tortured; it may not do so. Rather, this case is about whether, where appropriate policies and procedures are in place and the Secretary has followed them in determining that a [particular] fugitive is not likely to be tortured, courts may not inquire into that decision—a decision that often depends on complex, delicate, and confidential judgments concerning the state of affairs in foreign countries and multiple foreign relations considerations.

For these very reasons, this Court has held in the past that the Rule of Non-Inquiry governs even when humanitarian claims are raised in attempts to stop extraditions. These precedents have not been overruled by Congress through the FARR Act or the REAL ID Act. To the contrary, Congress' enactments since the United States ratified the Torture Convention have reaffirmed that the Rule of Non-Inquiry governs attempts to attack in the courts the Secretary's extradition surrender determinations.

A contrary ruling that allowed judicial review of extradition surrender determinations made by the Secretary of State would impose a substantial cost. There is a significant public interest in ensuring that the United States abides by its own extradition treaty obligations so that these treaties can be effectively implemented. Thus, in denying a stay of extradition in another case, this Court explained that "the public interest will be served by the United States complying with a valid extradition application * * * under the treaty," because such compliance "promotes relations between the two countries, and enhances efforts to establish an international rule of law and order." *Artukovic v. Rison*, 784 F.2d 1354, 1356 (9th Cir. 1986).

A timely extradition process is a necessary aspect of a functioning extradition relationship between two nations. Excessive delay can jeopardize a foreign prosecution and undercut the core objective of extradition relationships to ensure that fugitives are brought to justice in the country in which their criminal conduct occurred. The United States can reasonably expect foreign governments to honor their extradition obligations to the United States only if it also honors its own such obligations.

Trinidad is accused of a serious, but straightforward, kidnapping offense in a Philippine court, yet the extradition process here has been pending for more than four years. It is therefore important that his extradition be carried out promptly, and all the more so given that the Secretary has concluded that Trinidad can be extradited consistent with the Torture Convention and U.S. law. If a relatively uncomplicated extradition request like this one becomes bogged down in U.S. courts for such a lengthy period, it will become apparent to our treaty partners that more complex requests may be futile or become so entangled in the courts that they become moot before the extradition can be carried out.

Such mootness has occurred twice recently with regard to extraditions that were severely delayed by litigation involving Torture Convention claims. This is what happened in *Cornejo* where an extradition to face murder charges in Mexico was mooted because the U.S. extradition proceedings took so long that the prosecution of the underlying criminal charges became time-barred in Mexico. See *Cornejo-Barreto v. Siefert*, 389 F.3d 1307 (9th Cir. 2004). And in *Mironescu v. Costner*, 480 F.3d 664 (4th Cir. 2007), *cert. dismissed*, 128 S. Ct. 976 (2008), the U.S. extradition proceedings took so long that the entire possible Romanian sentence for the

fugitive had expired before judicial review was completed and the case became moot, so that the Supreme Court granted the parties' request to dismiss the petition for certiorari.

Most recently, in another extradition proceeding in this Circuit, the Government was able to complete an extradition to Thailand, despite the existence of Torture Convention claim, only because the district court ruled that the fugitive had not made a sufficient showing of likely torture, and this Court denied a request to enjoin the surrender pending appeal. See *Prasoprat v. Benov*, No. 09-56067 (9th Cir. March 10, 2010) (order denying stay of extradition). Even in that circumstance, the extradition took approximately nine years to effectuate.

These problems in the extradition process will be compounded if a fugitive can extend an already protracted and multi-layered extradition process by triggering a new round of judicial review following any decision by the Secretary involving torture risk allegations. Foreign governments will increasingly conclude that the U.S. court system renders the United States essentially incapable of complying in a timely and meaningful way with its extradition treaty obligations. The interest and ability of the United States to obtain reciprocal cooperation by its treaty partners would thereby be seriously and irreparably damaged by such a ruling.

ARGUMENT

Under The REAL ID Act And The Rule Of Non-Inquiry, Trinidad's Challenge To The Determination By The Secretary Of State To Surrender Him For Extradition To The Philippines Is Not Justiciable.

A. The REAL ID Act Precludes Judicial Review of Torture Convention Claims in the Habeas Context.

1. The REAL ID Act (8 U.S.C. § 1252(a)(4)) requires dismissal of Trinidad's habeas petition attacking the Secretary's extradition surrender determination. Section 1252(a)(4) unambiguously provides that "the *sole* and *exclusive* means for judicial review of *any* cause or claim under the [Torture Convention]" is the filing in a court of appeals of a petition for review challenging a final order of removal under the immigration laws (emphasis added). See 8 U.S.C. 1252(a)(1) (providing review of a "final 8 order of removal").

Congress could not have used more explicit terms to provide that a claim under the Torture Convention is susceptible of judicial review only in a single circumstance. Because the sole circumstance where review of a Torture Convention claim is available is in the context of a final order of immigration removal, the language of the REAL ID Act necessarily precludes Administrative Procedure Act review of a Torture Convention claim under habeas law in connection with an extradition surrender decision. And, there can be no question that Trinidad's claim here arises under the Torture Convention.

The REAL ID Act limitation on jurisdiction over Torture Convention claims exists notwithstanding any other provision of law (statutory or nonstatutory), including section 2241 of Title 28, or any other habeas corpus provision." 8 U.S.C. 1254(a)(4). By using this language, Congress intended to supersede any potentially conflicting law. See *Cisneros v. Alpine Ridge Group*, 508 U.S. 10, 18 (1993) ("[T]he use of such a 'notwithstanding' clause clearly signals the drafter's intention that the provisions of the 'notwithstanding' section override conflicting provisions of any other section").

Congress also explicitly provided that the REAL ID Act superseded statutory *and nonstatutory* law, and it therefore preempts contrary judicial decisions – including [*Cornejo-Barreto v. Seifert*, 218 F.3d 1004 (9th Cir. 2000) ("*Cornejo I*")] and any other decision allowing for habeas jurisdiction over Torture Convention claims outside the specified context of a final order of removal.

* * * *

2. The district court here, relying on the magistrate judge's recommendation, nevertheless found the plain text of the REAL ID Act inapplicable because the court detected no indication that the statute was meant to govern in the extradition context. The district court cited language in the statute and its legislative history to show that Congress' focus when passing this statute was on immigration order review issues. But the district court's lengthy discussion of the legislative background of the REAL ID Act merely reveals that Congress was spurred to act specifically by concerns about avenues of judicial relief over Torture Convention claims in the immigration context, and that through Section 1252(a)(4) it was making some types of Torture Convention claims enforceable in U.S. courts in certain immigration proceedings.

The district court did not cite any evidence that the unequivocal statutory text narrowly allowing judicial review of Torture Convention claims only in the context of a final order of removal was, contrary to its plain terms, meant to allow enforcement of Torture Convention-based claims in other types of habeas proceedings, such as in the extradition context. The district court therefore had no justification for disregarding the plain statutory text.

3. The text of the REAL ID Act squares with the fact that Article 3 of the Torture Convention is not self-executing, and therefore, in the absence of implementing legislation, creates no judicially enforceable rights in the context of extradition. The U.S. Senate expressly conditioned its advice and consent to ratification of the Torture Convention on a declaration that Articles 1 through 16 of the Convention are "not self-executing," 136 Cong. Rec. S17486-01, S17491-92 (Oct. 27, 1990); see also S. Exec. Rep. No. 101-30, at 31 (1990). Indeed, the Executive Branch explained in a statement that was included in the Senate's report on the Torture Convention that because these treaty provisions are not self-executing, extradition determinations by the Executive Branch "will not be subject to judicial review in domestic courts." S. Exec. Rep. No. 101-30, at 17-18.

The Supreme Court has made clear that a non-self-executing treaty such as the Torture Convention does not confer judicially enforceable rights upon a private party. See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 735 (2004) (a non self-executing treaty does not create obligations directly enforceable by private parties in the federal courts, even when, by its terms, that treaty protects individual civil rights); *Whitney v. Robertson*, 124 U.S. 190, 194 (1888) (if a treaty's "stipulations are not self-executing, they can only be enforced pursuant to legislation to carry them into effect").

* * * *

4. The language of the REAL ID Act refutes the rationale of the panel majority in *Cornejo I*, which stated hypothetically that there would be review of extradition surrender decisions by the Secretary of State concerning Torture Convention claims. That view was based on the notion that the Torture Convention and the FARR Act [the Foreign Affairs Reform and Restructuring Act of 1988, 8 U.S.C. § 1231 note, enacted to carry out the Torture Convention] set a standard by which the courts could judge extradition determinations by the Secretary of State in a habeas action, utilizing the review mechanism of the Administrative Procedure Act. See *Cornejo I*, 218 F.3d at 1013-17. But Section 1252(a)(4) of the REAL ID Act makes clear

that there is no jurisdiction over Torture Convention-based claims under the habeas statute or any other, except in specified instances of final orders of removal.

Trinidad has previously asserted that the habeas statute nevertheless provides a mechanism for judicial enforcement of non-self-executing treaty provisions. This Court's sister Circuits have rejected the proposition that non-self-executing treaty provisions can be enforced in the courts through habeas relief. See *Poindexter v. Nash*, 333 F.3d 372, 379 (2d Cir. 2003); *Bannerman v. Snyder*, 325 F.3d 722, 724 (6th Cir. 2003); *Wesson v. U.S. Penitentiary Beaumont*, 305 F.3d 343, 348 (5th Cir. 2002); *Hain v. Gibson*, 287 F.3d 1224, 1243 (10th Cir. 2002); *United States ex rel. Perez v. Warden*, 286 F.3d 1059, 1063 (8th Cir. 2002). That consensus is correct because non-self-executing treaty provisions can be enforced through the courts only if Congress has taken explicit action to make them enforceable through judicial actions by private parties.

* * * *

5. Trinidad has also previously argued that Section 1252(a)(4) of the REAL ID Act should not be read to 'eliminate' habeas jurisdiction to review extradition surrender decisions because Congress did not make such an intent sufficiently clear, and because Congress did not provide an adequate substitute for habeas relief. There are several problems with these arguments.

First, Congress did not eliminate existing habeas jurisdiction in the REAL ID Act – no habeas review of extradition surrender decisions was available in the first place. …[T]his Court and its sister Circuits have for years applied the Rule of Non-Inquiry, under which the courts will not review extradition surrender decisions by the Secretary of State. See, *e.g.*, *Lopez-Smith v. Hood*, 121 F.3d 1322 (9th Cir. 1997); *United States v. Kin-Hong*, 110 F.3d 103 (1st Cir. 1997). Thus, long before the REAL ID Act, this Court had determined, based on constitutional principles, that there was no habeas right to have a court overturn the Secretary's extradition surrender determinations.

Second, the *Cornejo I* panel majority opined only that the Torture Convention and the FARR Act had for the first time provided a legal standard by which a court could review an extradition surrender decision under the Administrative Procedure Act. The *Cornejo I* panel majority did not create a habeas right that had not existed before; the courts do not create statutory habeas rights. And, Congress in the FARR Act also did not create any habeas rights for extradition fugitives—to the contrary, the plain language of Section 2242(d) of that statute states unequivocally that the FARR Act was ***not*** providing any jurisdiction for a Torture Convention claim to be heard in court except in the immigration removal context. See 8 U.S.C. § 1231 note. Similarly, as shown earlier, the relevant articles of the Torture Convention are not self-executing, and thus did not create any habeas rights enforceable in U.S. courts. See *Cornejo I*, 218 F.3d at 1017 (Kozinski, J., concurring).

Thus, as the many decisions applying the Rule of Non-Inquiry established, no habeas right to obtain judicial review of an extradition surrender decision by the Secretary of State existed, and no such right was created by the Torture Convention or the FARR Act. Accordingly, nothing in the REAL ID Act could be said to have taken away an existing habeas right, given that no such right existed in the first place.

This Court need go no further in its analysis—the REAL ID Act requires dismissal of Trinidad's petition.

B. The Principles Applied by the Supreme Court in *Munaf* Reinforce the Rule of Non-Inquiry and Preclude Judicial Review of the Secretary of State's Determination to Surrender Trinidad for Extradition.

Even aside from the limiting language of the REAL ID Act, the principles recently enunciated by the Supreme Court in [*Munaf v. Geren*, 553 U.S. 674(2008)] reinforce the longstanding Rule of Non-Inquiry, which precludes judicial review of the Secretary of State's extradition surrender decisions.

This Court has recognized that once a judicial officer has properly determined that a fugitive is extraditable under the relevant treaty and the applicable U.S. law, the process moves into the foreign affairs arena, and authority over surrender rests entirely with the Executive Branch. [*Prasoprat v. Benov*, 421 F.3d 1009 (9th Cir. 2005).] at 1016-17. At that stage, the Secretary of State exercises her responsibility to determine whether, and under what circumstances, a fugitive should be surrendered for extradition to the requesting country. *Prasoprat*, 421 F.3d at 1012; *Lopez-Smith* [*v. Hood*, 121 F.3d 1322 (9th Cir.1997)] at 1326. The statutory commitment of this decision to the Secretary reflects a recognition that her determination necessarily involves the application of particular expertise that is not available in the Judiciary, and sensitive foreign relations considerations that are not amenable to judicial review.

In *Munaf* the Supreme Court held that, because the case involved U.S. citizen detainees, the courts had habeas jurisdiction to review a decision by the Executive to surrender two U.S. citizens to Iraqi authorities in order to face criminal charges in Iraqi courts. The Supreme Court nevertheless determined that equitable habeas principles governed and made judicial interference with the Executive's planned action legally inappropriate in light of the United States' firm policy against transferring any person to torture. The petitioners countered that these normal principles were trumped because their transfer to Iraqi custody was likely to result in torture. See 553 U.S. at 700.

Although allegations of likely torture were "of course a matter of serious concern" to the Supreme Court, the Court unequivocally ruled that this "concern is to be addressed by the political branches, not the judiciary," citing the basic principle behind the Rule of Non-Inquiry (*ibid*). The *Munaf* Court recognized that the Executive may "decline to surrender a detainee for many reasons, including humanitarian ones" (553 U.S. at 702). Significantly, the *Munaf* Court noted the Executive's policy not to transfer a detainee where torture is likely to follow and, like the instant case, *Munaf* did not involve a situation in which the Executive had determined that torture would be likely. *Ibid*.

Under these circumstances, the Supreme Court instructed that, while "the Judiciary is not suited to second-guess such determinations, * * * the political branches are well situated to consider sensitive foreign policy issues, such as whether there is a serious prospect of torture at the hands of an ally, and what to do about it if there is." 553 U.S. at 702. The Court recognized that the political branches possess significant diplomatic tools and leverage the judiciary lacks." *Ibid.*

* * * *

Munaf establishes that the principles animating the Rule of Non-Inquiry govern fully in a case like this one in which Trinidad asks the courts to review an extradition surrender determination by the Secretaryof State that rejected allegations of likely torture in a receiving state. …

Just as in *Munaf*, judicial review of the Secretary's extradition surrender determinations would place this Court in an obviously inappropriate position. For example, suppose the Secretary had determined in a particular case that, despite a history of human rights abuses in that country, a fugitive would not be tortured. On that basis, and with appropriate provision for monitoring, she then concludes, consistent with the FARR Act and the Torture Convention, that it is *not* more likely than not that the fugitive would be tortured. A court could evaluate that decision only by second-guessing the expert opinion of the Department of State. It is difficult to contemplate how judges would reliably make such a prediction, lacking any ability to communicate with the foreign government or to weigh the situation there, including the bilateral relationship with the United States, with resources and expertise comparable to those of the Department of State. See *Munaf*, 553 U.S. at 70-03.

Only the Secretary of State has the diplomatic tools at her disposal to best protect a fugitive or ensure humane treatment upon his extradition. See *Munaf*, 553 U.S. at 702-03; *Kin-Hong*, 110 F.3d at 110. The Secretary may decide to attach conditions to the surrender of the fugitive, such as a demand that the requesting country provide assurances regarding the individual's treatment. See *Munaf*, 1553 U.S. at 702 (noting Solicitor General's explanation that determinations regarding torture are based on the Executive's ability to obtain foreign assurances it considers reliable); *Jimenez v. United States District Court*, 84 S. Ct. 14, 19 (1963) (describing commitments made by foreign government to Department of State as a condition of surrender) (Goldberg, J., in chambers). But even the decision to demand such assurances from a foreign state can raise delicate foreign relations issues.

Application of the Rule of Non-Inquiry here makes sense in light of the factors involved in extradition surrender determinations, the inherent limits on the ability of courts to adjudicate issues intimately tied to foreign relations, and the fact that the Department of State has put into place appropriate policies and procedures for determining whether a fugitive is more likely than not to be tortured.

The Secretary of State already has the responsibility to ensure that extraditions are legally carried out. In other words, "[i]t is not that questions about what awaits the relator in the requesting country are irrelevant to extradition; it is that there is another branch of government, which has both final say and greater discretion in these proceedings, to whom these questions are more properly addressed." *Kin-Hong*, 110 F.3d at 111; see *Munaf*, 553 U.S. at 702. Trinidad's argument wrongly assumes that the Secretary will seek to extradite someone to face torture, but the courts have long recognized the presumption that the decisions of government officials are made in good faith. *United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926); see also *Jennings v. Mansfield*, 509 F.3d 1362, 1367 (Fed. Cir. 2007). In the present case, the procedures established by the Secretary render such a presumption particularly appropriate.

In sum, in *Lopez-Smith*, this Court reaffirmed the Rule of Non-Inquiry, and refused to grant a habeas writ to stop an extradition despite the petitioner's contention that the legal procedures and punishment he faced in Mexico after extradition were "antipathetic" to the Court's "sense of decency." 121 F.3d at 1326. The Court here should again reaffirm the Rule of Non-Inquiry and reverse the grant of the habeas writ no those grounds.

C. Neither the Torture Convention Nor the FARR Act Overturned the Rule of Non-Inquiry so as to Provide for Judicial Review of the Secretary's Surrender Determinations.

The *Cornejo I* panel majority cited the holding from *Lopez-Smith* to the effect that no judicial review of the Secretary of State's extradition surrender order is available. See 218 F.3d

at 1010. Nevertheless, the panel opined that the FARR Act made the Secretary's extradition surrender decisions justiciable because that statute placed a nondiscretionary duty on the Secretary not to extradite fugitives if she finds it is more likely than not that they will be tortured. *Cornejo I*, 218 F.3d at 1014. In fact, no such justiciability rule can be based on the FARR Act.

1. Trinidad has contended that Article 3 of the Torture Act prohibits the extradition of a person who more likely than not will be tortured, and that the FARR Act creates a duty on the part of the Secretary of State to implement that prohibition. While these contentions are correct, neither of those instruments makes justiciable the Secretary's surrender determination which is exclusively within the province of the Secretary of State.

The text of the FARR Act contradicts any notion that Congress intended to radically alter the law and abruptly create judicial review of extradition surrender determinations by the Secretary of State. To the contrary, as described earlier, the FARR Act states that "[n]otwithstanding any other provision of law * * * nothing in this section shall be construed as providing any court jurisdiction to consider or review claims raised under the [Torture Convention] or this section * * * except as part of the review of a final order of removal [in immigration cases]." 8 U.S.C. 1231 note, Sec. 2242(d).

This clear statutory text establishes that Congress did not override the Rule of Non-Inquiry and surreptitiously through the FARR Act make extradition surrender decisions justiciable. See also H.R. Conf. Rep. No.105-432, at 150 (1998) ("The provision agreed to by the conferees does not permit for judicial review of the regulations or of most claims under the Convention"). Rather, the FARR Act provided for jurisdiction over claims under the Torture Convention only in review of final immigration removal orders. See *Al-Anazi v. Bush*, 370 F. Supp. 2d 188, 194 (D.D.C. 2005). No such removal order is at issue here.

In view of the clear statutory wording of the FARR Act, the dictum in *Cornejo I* that this language only "prohibits courts from reading an implied cause of action into the statute" (218 F.3d at 1015) is mistaken. The FARR Act language manifestly provides that the statute creates no jurisdiction for judicial review of an extradition surrender determination by the Secretary of State.

* * * *

In addition, the regulations promulgated by the Department of State under the express authority of the FARR Act firmly support the proposition that nothing in that statute established a new right to judicial review of extradition surrender determinations. On their face, the regulations indicate that there is no judicial review of the Secretary's extradition surrender decisions. See 22 C.F.R. 95.4 ("[N]otwithstanding any other provision of law * * * nothing in section 2242 shall be construed as providing any court jurisdiction to consider or review claims raised under the Convention or section 2242, or any other determination made with respect to the application of the policy set forth in section 2242(a), except as part of the review of a final order of removal pursuant to section 242 of the Immigration and Nationality Act (8 U.S.C. 1252), which is not applicable to extradition proceedings").

Especially in light of Congress's explicit delegation to the Secretary of State the authority to "implement" the obligations of the United States under the Torture Convention, these State Department regulations deserve substantial deference as published agency interpretations of the FARR Act. See *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (where there has been a Congressional delegation of administrative authority, courts must defer to reasonable agency interpretation).

The language of the FARR Act and the State Department implementing regulations demonstrate that the FARR Act did not suddenly and silently make justiciable the extradition surrender determinations by the Secretary, contrary to the longstanding Rule of Non-Inquiry.

* * * *

4. Extradition of fugitive alleging failure to comply with requirements of extradition treaty

On December 20, 2011, the U.S. Court of Appeals for the Second Circuit reversed the district court's grant of habeas relief to a Greek fugitive whom the U.S. government sought to extradite to face charges as an accessory to homicide in Greece. *Skaftouros v. United States*, 667 F.3d 144 (2d. Cir. 2011). Skaftouros successfully challenged his extradition in the district court based on purported failures to comply with requirements of the Extradition Treaty between the United States and Greece ("the Treaty"). First, he claimed that the arrest warrant issued in Greece was not valid because it had not been signed by the clerk of the court there. Second, he claimed that the applicable statute of limitations had expired.

The Court of Appeals held that the district court had improperly placed the burden of proof on the government to prove compliance with the extradition treaty and had further erred in engaging in an analysis of the foreign country's laws and procedures beyond what was needed to ensure compliance with the extradition treaty. With the proper allocation of burden and inquiry, the Court concluded that the arrest warrant was valid under the Treaty and the statute of limitations had not run. The Court reversed and remanded, directing the district court to order extradition.

The Court also explained that the district court's error was based in part on a misreading of another Second Circuit decision that was issued while the Skaftouros habeas petition was under review, *Sacirbey v. Guccione,* 589 F.3d 52 (2d Cir.2009). In that case, the Second Circuit held that the arrest warrant of the fugitive was invalid under the extradition treaty because the court in Bosnia that had issued it had been dissolved and no new warrant had been issued. The Court in *Skaftouros* explained that the circumstances in *Sacirbey* were extraordinary and distinguishable from those in *Skaftouros*.

The Second Circuit's opinion is excerpted below with footnotes and the discussion of the background in the case omitted.

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B. The District Court Erred in Granting Skaftouros's Habeas Petition

…[W]e hold that the District Court erred in granting Skaftouros's petition for a writ of habeas corpus. The District Court's primary error was in imposing the burden of proof on the Government to show that the requirements of Greek law had been met. As a result of this underlying error, the District Court wrongly concluded that Greece had not produced a valid arrest warrant and that the statute of limitations had expired. We address each error in turn.

1. *The District Court Erred in Imposing the Burden of Proof on the Government*

It is apparent from the opinion under review that the District Court placed the burden of

proof on the Government in the habeas proceeding. With respect to the statute of limitations issue, this placement was explicit: "Although the Government need not prove beyond a reasonable doubt that the statute of limitations has not run in an extradition proceeding, ... [t]he internally inconsistent documents submitted without sufficient explanation do not serve to meet even the Government's lesser burden of proof on the statute of limitations issue." *Skaftouros II*, 759 F.Supp.2d at 360–61. Although the District Court did not expressly place the burden of proof on the Government with respect to the issue of whether Greece had satisfied the Treaty's requirement of a "duly authenticated warrant," it interpreted our opinion in *Sacirbey* to "obligate [ ] the Government to prove the existence of a 'valid arrest warrant' " in order to defeat the habeas petition. *Skaftouros II*, 759 F.Supp.2d at 358 (quoting *Sacirbey*, 589 F.3d at 67 (emphasis in *Skaftouros II*)). We hold that it was error for the District Court to effectively impose on the Government the burden of proving that Skaftouros was *not* "in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2241(c)(3).

Habeas corpus, it is well known, "is not a neutral proceeding in which the petitioner and the State stand on an equal footing. Rather, it is an asymmetrical enterprise in which a prisoner seeks to overturn a presumptively valid judgment...." *Pinkney v. Keane*, 920 F.2d 1090, 1094 (2d Cir.1990) (construing 28 U.S.C. § 2254); *see also Fernandez*, 268 U.S. at 312, 45 S.Ct. 541 (habeas corpus "is not a means for rehearing what the magistrate already has decided. The alleged fugitive from justice has had his hearing...."). Because we accord a presumption of validity to a judgment on collateral review, it is the petitioner who bears the burden of proving that he is being held contrary to law; and because the habeas proceeding is civil in nature, the petitioner must satisfy his burden of proof by a preponderance of the evidence. *Parke v. Raley*, 506 U.S. 20, 31, 113 S.Ct. 517, 121 L.Ed.2d 391 (1992) ("Our precedents make clear ... [that] the presumption of regularity that attaches to final judgments makes it appropriate to assign a proof burden to the [petitioner]."); *Walker v. Johnston*, 312 U.S. 275, 286, 61 S.Ct. 574, 85 L.Ed. 830 (1941) ("On a hearing [the § 2241 petitioner has] the burden of sustaining his allegations by a preponderance of evidence.").

Although we are not aware of any specific authority on the subject, we see no reason why the general habeas corpus standard of proof would not apply to habeas petitions arising from international extradition proceedings. As the Supreme Court held in a case construing the interstate extradition statute, 18 U.S.C. § 3181, "[p]rima facie[, the petitioner is] in lawful custody and upon him rest[s] the burden of overcoming this presumption by proof." *South Carolina v. Bailey*, 289 U.S. 412, 417, 53 S.Ct. 667, 77 L.Ed. 1292 (1933). Similarly, collateral review of an international extradition order should begin with the presumption that both the order and the related custody of the fugitive are lawful.

We therefore hold that, in order to merit habeas relief in a proceeding seeking collateral review of an extradition order, the petitioner must prove by a preponderance of the evidence that he is "in custody in violation of the Constitution or laws or treaties of the United States," 28 U.S.C. § 2241(c)(3), which, in this context, will typically mean in violation of the federal extradition statute, 18 U.S.C. § 3184, or the applicable extradition treaty.

This is not to say that a judge considering a petition for a writ of habeas corpus arising out of an extradition proceeding is expected to wield a rubber stamp. To the contrary, as we observed in *Sacirbey*, despite the narrow scope of habeas review in the extradition context, "[i]t is nevertheless 'our duty ... to ensur[e] that the applicable provisions of the treaty and the governing American statutes are complied with.' " 589 F.3d at 63 (quoting *Petrushansky*, 325 F.2d at 565). However, *Sacirbey* did not impose a general burden of proof the Government in the

context of a habeas proceeding. Although we held that the applicable extradition treaty required the demanding country to "*provide, inter alia,* a valid warrant," 589 F.3d at 67 (emphasis added), that holding related to the initial extradition proceeding, where the Government, on behalf of the demanding country, does indeed bear the burden of proof. We did not hold that the burden remains with the Government at the habeas stage, after a presumptively valid certificate of extradition has already been issued.

The District Court's placement of the burden of proof on the Government in this case was error. As explained in more detail below, this error caused the District Court to improperly examine Greece's compliance with its own law and to determine that certain requirements of the Treaty were not satisfied. These were legal determinations, which we review *de novo.* …. Upon a review of the record, we conclude that the requirements of the U.S. extradition statute, 18 U.S.C. § 3184, and the Treaty have been satisfied.

2. *The Treaty's Requirement of a "Duly Authenticated" Warrant is Satisfied*

Had the burden of proof been properly assigned by the District Court, in order to obtain the writ of habeas corpus, Skaftouros would have been required to prove, by a preponderance of the evidence, that the arrest warrant provided by the Greek government did not satisfy the Treaty's requirement of a "duly authenticated warrant" sufficient to show that he was "charged" with a crime recognized by the Treaty. Upon a review of the record, we hold that Skaftouros did not, and cannot, carry this burden.

In common with other extradition treaties, the U.S.-Greece Treaty requires that, in cases where a fugitive is "merely charged with crime, a duly authenticated copy of the warrant of arrest in the country where the crime was committed, and of the depositions upon which such warrant may have been issued, shall be produced." Treaty art. XI. Greece fully complied with this requirement by submitting a warrant for Skaftouros's arrest that was authenticated by the U.S. Ambassador to Greece, along with an indictment demonstrating the existence of probable cause to believe Skaftouros had committed the crime charged. In most cases, the production of an arrest warrant authenticated by the principal diplomatic officer of the United States in the demanding country will suffice to satisfy a treaty's "duly authenticated warrant" requirement. … In this case, however, the District Court went further, and imposed on the Government the burden of proving that the arrest warrant was technically valid as a matter of *Greek* law. In so doing, the District Court explained that it relied on our opinion in *Sacirbey*, and in particular our reference therein to the invalidity of a foreign arrest warrant. But *Sacirbey* was not intended as a break from the previous, well-established authority that the question of whether an arrest warrant is in technical compliance with the law of the demanding country is not to be decided by U.S. courts. Rather, *Sacirbey* stands for the unexceptional proposition that a foreign arrest warrant cannot suffice to show that a fugitive is currently charged with an offense, as required by most extradition treaties, where the court that issued the warrant no longer has the power to enforce it.

Importantly, our analysis in *Sacirbey* was limited to determining whether the requirements of the extradition treaty were met; the majority opinion did not engage questions of Bosnian law. *See* 589 F.3d at 63. Thus, when we stated that "the proof required under the Treaty to establish that an individual has been 'charged' with a crime is a valid arrest warrant," *id.* at 67, we were not referring to validity as a matter of technical compliance with Bosnian criminal procedure, but rather to validity under the applicable treaty. To the extent the language in our opinion in *Sacirbey* has engendered confusion on this point, we now clarify that a "valid arrest warrant" is one that is "duly authenticated" as required by § 3190 and the applicable treaty, and sufficient to show that the fugitive is *currently charged* with an offense recognized by the treaty.

It must, in other words, show that the fugitive is in fact "prosecutab[le]" upon extradition to the demanding country. *See McMullen,* 989 F.2d at 611.

Unlike the arrest warrant in *Sacirbey,* which failed to show that the fugitive was currently charged and prosecutable, the arrest warrant provided by Greece in this case satisfies these requirements. The defects that Skaftouros identifies—namely, that the warrant does not contain the signature of the Clerk or a sufficiently detailed description of his face—are technical in nature, not jurisdictional as in *Sacirbey.* And, as we have stated before, arguments that "savor of technicality" are "peculiarly inappropriate in dealings with a foreign nation." *Shapiro,* 478 F.2d at 904 (quoting *Bingham,* 241 U.S. at 517, 36 S.Ct. 634 (internal modification removed)).

Skaftouros is, of course, free to raise these technical objections before the courts of Greece, which, we are confident, will be more competent to address them than an American court. …. Our concern is solely with the requirements of the Treaty and the federal extradition statute. We hold that the arrest warrant satisfies these requirements because it is duly authenticated and shows that Skaftouros is currently charged with an offense recognized by the Treaty, and is therefore prosecutable.

3. *The Treaty's Requirement that the Statute of Limitations on the Charged Offense Not Have Expired is Satisfied*

The District Court properly noted that the Treaty does not permit extradition where, "'from lapse of time or other lawful cause, according to the laws of either of the surrendering country [sic] or the demanding country, the criminal is exempt from prosecution or punishment for the offense for which the surrender is asked.' " *See Skaftouros II,* 759 F.Supp.2d at 359 (quoting Treaty art. V). Because the Treaty itself requires an examination of whether the statute of limitations of either the demanding or asylum country has expired (and because the United States does not have a statute of limitations for first degree murder…), it was proper for the District Court to examine Greek law for the limited purpose of determining whether its statute of limitations had expired. In so doing, however, the District Court again improperly placed the burden on the Government to prove that the statute of limitations had not run, rather than on Skaftouros to prove that it had.

The parties agreed that the Greek statute of limitations for aggravated murder is ordinarily twenty years. The Government, however, argued that the normal statute of limitations had been extended under Article 113 of the Greek Criminal Code, which states that the statute of limitations may be tolled for up to five years when it is not possible to commence or continue a prosecution. … In support of this argument, the Government submitted a letter from the Public Prosecutor of the Court of Appeals of Athens stating that the statute of limitations had been so tolled in this case, owing to Skaftouros's failure to appear to answer the charges against him. In order to show that Skaftouros had been properly served with the indictment, a requirement of Article 113, the Government produced the April 17, 1991, request from the Public Prosecutor that police serve the indictment; the May 6, 1991, confirmation from the police to the Public Prosecutor that the indictment had been served on Skaftouros's mother; and the October 1991 Order suspending the proceedings, which noted the "legal service" of the indictment on May 5, 1991. In the habeas proceeding, it was Skaftouros's burden as the petitioner to show that the statute of limitations had not in fact been extended by operation of Article 113 and therefore had expired. This Skaftouros attempted to do by arguing that only the original certificate of service of the indictment would suffice to show that the statute of limitations had been extended. However, Skaftouros offered no authority for this position, save for the unsworn and unsupported assertion of his own lawyer in Greece.

We find that the averment of Skaftouros's Greek counsel was insufficient to satisfy Skaftouros's burden of proving that the statute of limitations had not been extended. The District Court's contrary holding was error, and derived from its improper placement of the burden of proof on the Government. *See Skaftouros II*, 759 F.Supp.2d at 360 (finding that "the Government has not provided adequate proof that the Order extending the statute of limitations was served on Skaftouros or his close relative").

In placing the burden of proof on the Government, the District Court relied on our opinion in *Jhirad v. Ferrandina*, 536 F.2d 478 (2d Cir.1976). In *Jhirad*, however, our consideration of the question of burdens of proof was limited to whether the demanding country in an extradition proceeding should have to prove beyond a reasonable doubt that the American statute of limitations was tolled by virtue of 18 U.S.C. § 3290, which provides that "[n]o statute of limitations shall extend to any person fleeing from justice." *See Jhirad*, 536 F.2d at 484–85. Noting that the interests served by the beyond-a-reasonable-doubt standard apply "with less force in the context of an international extradition proceeding," we held that India, the demanding country and real party in interest, was only required to prove by a preponderance of the evidence that the statute had been tolled. *Id.* at 484. We did not address the assignment of the burden of proof in a habeas proceeding challenging the legality of an extradition proceeding, but rather the assignment of the burden in the extradition proceeding, itself.

The evidence before the District Court strongly suggested that the statute of limitations had been tolled by virtue of the October 1991 Order. Skaftouros's argument that the October 1991 Order was ineffective because there was insufficient proof that he had been served with the indictment is supported only by the word of his own Greek attorney—an averment lacking any indicia of reliability whatsoever. It is clear to us, therefore, that Skaftouros did not meet his burden of proving, even by a preponderance of the evidence, that the applicable Greek statute of limitations had expired or that Article V of the Treaty had not been satisfied.

* * * *

5. Universal Jurisdiction

On October 18, 2011, Steven Hill, Counselor to the U.S. Mission to the United Nations, delivered remarks on the U.N. General Assembly Sixth (Legal) Committee's session on the scope and application of the principle of universal jurisdiction. Mr. Hill's remarks are excerpted below and are available in full at *http://usun.state.gov/briefing/statements/2011/177342.htm*.

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We greatly appreciate the Sixth Committee's continued interest in this important item. We thank the Secretary-General for his report (A/66/93), which is an extremely useful reference on this topic.

The United States has already submitted information and views on universal jurisdiction; those views were included in the Secretary-General's report last year (A/65/181). In the interest of the efficiency of our discussions today, we will only highlight a few of these points.

We supported the decision to consider the scope and application of the principle of

universal jurisdiction in a working group because the topic is an important but complicated one. As we look over the reports of the Secretary-General, it is clear that basic questions remain about universal jurisdiction and the views and practices of states related to the topic. Some questions that might be examined by the working group include the following.

First is the question of definition: what do we mean when we refer to universal jurisdiction? For purposes of this discussion and as detailed in our submission, the United States has understood universal jurisdiction to include assertion of criminal jurisdiction by a State for certain grave offenses, where the only link to the particular crime is the presence in its territory of the alleged offender. However, we know that others have somewhat different views, and we look forward to exploring that in the working group.

The second question relates to the appropriate scope of the principle. That is to say, to what crimes do universal jurisdictions apply?

Other questions include the relationship between universal jurisdiction and treaty-based obligations, as well as the need to ensure that decisions to invoke it are undertaken in an appropriate manner, including in cases where there are other States that may exercise jurisdiction.

We look forward to exploring these issues in as practical a manner as possible. We look forward to participating in the working group.

* * * *

6. Visa Waiver Program Agreements on Preventing and Combating Serious Crime

During 2011, the United States signed bilateral agreements with Belgium, Croatia, Ireland, and Sweden on preventing and combating serious crime. The agreements provide a mechanism for the parties' law enforcement authorities to exchange personal data, including biometric (fingerprint) information, for use in detecting, investigating, and prosecuting terrorists and other criminals. The agreement with Croatia entered into force in 2011, as did the agreement signed in 2010 with Denmark, the agreement signed in 2009 with Portugal, and the agreements signed in 2008 with Germany and Malta. For background, see *Digest 2008* at 80–83, *Digest 2009* at 66, and *Digest 2010* at 57-58. The agreements with Croatia, Denmark, Germany, and Malta are available at *www.state.gov/documents/organization/179966.pdf*, *www.state.gov/documents/organization/169476.pdf*, *www.state.gov/documents/organization/169463.pdf*, and *www.state.gov/documents/organization/180611.pdf*, respectively. As of the end of 2011, the United States continued to negotiate such data-sharing agreements with other members of the Visa Waiver Program, consistent with a federal statute requiring completion of such agreements with all members of the program.

B. INTERNATIONAL CRIMES

1. Terrorism

a. Country reports on terrorism

On August 18, 2011, the Department of State released the 2010 Country Reports on Terrorism. The annual report is submitted to Congress pursuant to 22 U.S.C. § 2656f, which requires the Department to provide Congress a full and complete annual report on terrorism for those countries and groups meeting the criteria set forth in the legislation. The report is available at *www.state.gov/j/ct/rls/crt/2010*.

b. UN General Assembly

On November 18, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the U.N., addressed the General Assembly at its session to discuss a foiled terrorist plot to assassinate the Ambassador of Saudi Arabia to the United States. In the excerpts below, Ambassador Rice welcomed the resolution condemning terrorism generally and the Iran-supported plot against the Saudi Ambassador in particular. UN Doc. A/RES/66/12. The full text of Ambassador Rice's remarks is available at *http://usun.state.gov/briefing/statements/2011/177393.htm*.

* * * *

I want to begin by congratulating the people of Saudi Arabia for their overwhelming success here in the General Assembly. But I also want to congratulate the member states of the General Assembly, because today—in a very powerful, unified statement of support—they came together to clearly condemn terrorism in all its forms, to deplore the plot to assassinate the Saudi Ambassador to the United States, and to call on Iran to fulfill its obligations under the 1973 convention[**] and cooperate with this investigation.

I think it's noteworthy that over a 100 countries—a total of 106—voted in favor of this resolution, and only nine opposed it. Nine. Iran plus eight. Not one of those eight countries was another Islamic—predominantly Islamic—or Arab country. Not one.

The world came together in a very strong message that diplomats and the work we do are sacrosanct. We all deserve protection and the ability to do the work of the state without fear or threat of violence.

And today, the members of the General Assembly delivered that message very forcefully. Iran is increasingly isolated here in this body at the United Nations in New York, again, today in Vienna. And I think this is indicative of the world's growing abhorrence of their behavior, including their support for terrorism, their pursuit of a nuclear weapons program and their gross

[**] Editor's note: The reference is to the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, including Diplomatic Agents, 1035 U.N.T.S. 15410.

violations of Human Rights.

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c. U.S. actions against support for terrorists

(1) U.S. targeted sanctions implementing UN Security Council resolutions

See Chapter 16.A.4.b.

(2) Foreign terrorist organizations

(i) New designations and modifications of existing designations

In 2011 the Department of State announced the Secretary of State's designation of two additional organizations and their associated aliases as Foreign Terrorist Organizations ("FTOs") under § 219 of the Immigration and Nationality Act: Army of Islam, also known as Jaish al-Islam, also known as Jaysh al-Islam (76 Fed. Reg. 29,812 (May 23, 2011)); and Indian Mujahideen, also known as Indian Mujahedeen, also known as Indian Mujahidin, also known as Islamic Security Force–Indian Mujahideen (ISF–IM) (76 Fed. Reg. 58,076 (Sept. 19, 2011)).

U.S. financial institutions are required to block funds of designated FTOs or their agents within their possession or control; representatives and members of designated FTOs, if they are aliens, are inadmissible to, and in some cases removable from, the United States; and U.S. persons or persons subject to U.S. jurisdiction are subject to criminal prohibitions on knowingly providing "material support or resources" to a designated FTO. 18 U.S.C. § 2339B. See *www.state.gov/j/ct/rls/other/des/123085.htm* for background on the applicable sanctions and other legal consequences of designation as an FTO.

(ii) Reviews of FTO designations

During 2011 the Secretary of State continued to review designations of entities as Foreign Terrorist Organizations ("FTOs"), and the Department of State announced the Deputy Secretary's determination that the designation of the following organization as an FTO "shall remain in place:" al-Aqsa Martyrs' Brigade, also known as al-Aqsa Martyrs' Battalion. 76 Fed. Reg. 17,979 (March 31, 2011).

The review was conducted consistent with the procedures for reviewing and revoking FTO designations in § 219(a) of the Immigration and Nationality Act, as amended by the Intelligence Reform and Terrorism Prevention Act of 2004 ("IRTPA"), Pub. L. No. 108-458, 118 Stat. 3638. See *Digest 2005* at 113–16 and *Digest 2008* at 101–3 for additional details on the IRTPA amendments and review procedures.

d. Global Counterterrorism Forum

On September 22, 2011, 29 countries and the European Union launched the Global Counterterrorism Forum ("GCTF"). The United States Department of State hosted the inaugural meeting of the GCTF's Criminal Justice/Rule of Law Working Group on November 3-4, 2011. The Criminal Justice/Rule of Law Working Group is co-chaired by the United States and Egypt and is one of five expert-led working groups of the GCTF. A State Department Media note, available at *www.state.gov/r/pa/prs/ps/2011/11/176609.htm*, described the agenda of the GCTF Working Group and the purpose generally of the GCTF.

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Attorney General Eric Holder will deliver opening remarks at this meeting, where senior counterterrorism prosecutors and other criminal justice officials from GCTF members will begin to develop a compendium of sound practices for effective counterterrorism practices in the criminal justice system. This is part of the broader GCTF effort to provide support for countries seeking to turn their backs on repressive approaches to counterterrorism and to encourage criminal justice authorities to adopt robust and human rights-compliant counterterrorism policies and practices that protect both the security and liberty of their citizens.

Once this compilation of good practices is finalized, the group will turn its attention to providing or facilitating the training, advising, and supporting other technical assistance to promote their implementation in interested countries, including those in the midst of the Arab Spring.

The GCTF is a major initiative within the Administration's broader effort to build the international architecture for dealing with 21st century terrorism. It provides a unique platform for senior counterterrorism policymakers and experts from around the world to work together to identify urgent needs, devise solutions, and mobilize resources for addressing key counterterrorism challenges. With its primary focus on capacity building in relevant areas, the GCTF aims to increase the number of countries capable of dealing with the terrorist threats within their borders and regions.

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2. Narcotrafficking

a. Majors List process

(1) International Narcotics Control Strategy Report

On March 3, 2011, the Department of State released the 2011 International Narcotics Control Strategy Report ("INCSR"), an annual report submitted to Congress in accordance with § 489 of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2291h(a). The report describes the efforts of key countries to attack all aspects of the international drug trade in Calendar Year 2010. Volume I covers drug and chemical control activities and Volume II covers money laundering and financial crimes. The report is available at www.state.gov/p/inl/rls/nrcrpt/2011/index.htm.

(2) Major drug transit or illicit drug producing countries

On September 15, 2011, President Obama issued Presidential Determination 2011-16, "Memorandum for the Secretary of State: Presidential Determination on Major Drug Transit or Major Illicit Drug Producing Countries for Fiscal Year 2012." Daily Comp. Pres. Docs., 2011 DCPD No. 00640, pp. 1–3. In this annual determination, the President named Afghanistan, The Bahamas, Belize, Bolivia, Burma, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, India, Jamaica, Laos, Mexico, Nicaragua, Pakistan, Panama, Peru, and Venezuela as countries meeting the definition of a major drug transit or major illicit drug producing country. A country's presence on the "Majors List" is not necessarily an adverse reflection of its government's counternarcotics efforts or level of cooperation with the United States. Belize and El Salvador were added to the list in 2011. The President designated Bolivia, Burma, and Venezuela as countries that have failed demonstrably to adhere to their international obligations in fighting narcotrafficking. Simultaneously, the President determined that "support for programs to aid Bolivia and Venezuela are vital to the national interests of the United States," thus ensuring that such U.S. assistance would not be restricted during fiscal year 2012 by virtue of § 706(3) of the Foreign Relations Authorization Act, Fiscal Year 2003, Pub. L. No. 107-228, 116 Stat. 1424. As a result of the President's designations, Burma remained ineligible during fiscal year 2012 for most types of U.S. assistance.

b. Interdiction assistance

During 2011 President Obama again certified, with respect to Colombia (76 Fed. Reg. 53,299 (Aug. 25, 2011)) and Brazil (Daily Comp. Pres. Docs., 2011 DCPD No. 00753, p. 1 , Oct. 14, 2011), that (1) interdiction of aircraft reasonably suspected to be primarily engaged in illicit drug trafficking in that country's airspace is necessary because of the extraordinary threat posed by illicit drug trafficking to the national security of that country; and (2) the country has appropriate procedures in place to protect against innocent loss of life in the air and on

the ground in connection with such interdiction, which shall at a minimum include effective means to identify and warn an aircraft before the use of force is directed against the aircraft. President Obama made his determinations pursuant to § 1012 of the National Defense Authorization Act for Fiscal Year 1995, as amended, 22 U.S.C. §§ 2291–4, following a thorough interagency review. For background on § 1012, see *Digest 2008* at 114.

3. Trafficking in Persons

a. Trafficking in Persons report

On June 27, 2011, the Department of State released the 2011 Trafficking in Persons Report pursuant to § 110(b)(1) of the Trafficking Victims Protection Act of 2000 ("TVPA"), Div. A, Pub. L. No. 106-386, 114 Stat. 1464, as amended, 22 U.S.C. § 7107. The report covered the period April 2010 through March 2011 and evaluated the anti-trafficking efforts of a greater number of countries (184) than in past years, including those of the United States. In her remarks upon the release of the 2011 report, available at *www.state.gov/secretary/rm/2011/06/167156.htm*, Secretary of State Hillary Rodham Clinton explained:

> Every year, we come together to release this report, to take stock of our progress, to make suggestions, and to refine our methods. Today, we are releasing a new report that ranks 184 countries, including our own. One of the innovations when I became Secretary was we were going to also analyze and rank ourselves, because I don't think it's fair for us to rank others if we don't look hard at who we are and what we're doing. This report is the product of a collaborative process that involves ambassadors and embassies and NGOs as well as our team here in Washington. And it really does give us a snapshot about what's happening. It shows us where political will and political leadership are making a difference.
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> * * * *
>
> Now it's only fair that countries know why they have a certain ranking, and that we, then, take on the responsibility of working with countries to respond. So we are issuing concrete recommendations and providing technical assistance. This week, U.S. diplomats around the world will be meeting with their host country governments to review action plans and provide recommendations when needed. And I'm instructing our embassies and the trafficking office to intensify partnerships in the coming months so that every country that wishes to can improve its standing.
>
> So while this report is encouraging more countries to come to the table, none of us can afford to be satisfied. Just because a so-called developed country has well-established rules, laws, and a strong criminal justice system, does not mean that any of

> us are doing everything we can. Even in these tight economic times, we need to look for creative ways to do better. And this goes for the United States, because we are shining a light on ourselves and we intend to do more in order to make our own situation better and help those who are interested in doing the same.

Through the report, the Department designated applicable countries as Tier 1, Tier 2, Tier 2 Watch List, or Tier 3 in relation to their efforts to comply with the minimum standards for the elimination of trafficking in persons as set out by the TVPA, as amended. The report listed 23 countries as Tier 3 countries, making them subject to certain restrictions on assistance in the absence of a Presidential national interest waiver. For details on the Department of State's methodology for designating states in the report, see *Digest 2008* at 115–17. The report is available at www.state.gov/documents/organization/164452.pdf, and the remarks of Under Secretary of State for Democracy and Global Affairs Maria Otero, and Ambassador-at-Large in the Office to Monitor and Combat Trafficking in Persons Luis CdeBaca, upon the release of the report are available at www.state.gov/g/167166.htm. Chapter 6.C.2.b. discusses the determinations relating to child soldiers.

b. Presidential determination

Consistent with § 110(c) of the Trafficking Victims Protection Act, as amended, 22 U.S.C. § 7107, the President annually submits to Congress notification of one of four specified determinations with respect to "each foreign country whose government, according to [the annual Trafficking in Persons report]—(A) does not comply with the minimum standards for the elimination of trafficking; and (B) is not making significant efforts to bring itself into compliance." The four determination options are set forth in § 110(d)(1)–(4).

On September 30, 2011, President Obama issued a memorandum for the Secretary of State, "Presidential Determination With Respect to Foreign Governments' Efforts Regarding Trafficking in Persons." Presidential Determination No. 2011-18, 76 Fed. Reg. 62,599 (Oct. 11, 2011). The President's memorandum contained determinations concerning the 23 countries that the 2011 Trafficking in Persons Report listed as Tier 3 countries. The President's determinations are excerpted below. See Chapter 3.B.3.a. *supra* for discussion of the 2011 report. The Memorandum of Justification Consistent with the Trafficking Victims Protection Act of 2000, Regarding Determinations with Respect to "Tier 3" Countries set forth the determinations the President made and their effect; the memorandum also included a separate discussion of each of the named countries. The memorandum of justification is available at www.state.gov/g/tip/rls/other/2011/175577.htm.

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Consistent with section 110 of the Trafficking Victims Protection Act of 2000 (Division A of

Public Law 106-386), as amended (the "Act"), I hereby:

Make the determination provided in section 110(d)(1)(A)(i) of the Act, with respect to Burma, the Democratic Republic of the Congo, Equatorial Guinea, and Zimbabwe, not to provide certain funding for those countries' governments for fiscal year 2012, until such governments comply with the minimum standards or make significant efforts to bring themselves into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act;

Make the determination provided in section 110(d)(l)(A)(ii) of the Act, with respect to Cuba, the Democratic People's Republic of North Korea (DPRK), Eritrea, Iran, Madagascar, and Venezuela, not to provide certain funding for those countries' governments for fiscal year 2012, until such governments comply with the minimum standards or make significant efforts to bring themselves into compliance, as may be determined by the Secretary of State in a report to the Congress pursuant to section 110(b) of the Act;

Determine, consistent with section 110(d)(4) of the Act, with respect to Algeria, the Central African Republic, Guinea-Bissau, Kuwait, Lebanon, Libya, Mauritania, Micronesia, Papua New Guinea, Saudi Arabia, Sudan, Turkmenistan, and Yemen that provision to these countries' governments of all programs, projects, or activities of assistance described in sections 110(d)(l)(A)(i)-(ii) and 110(d)(l)(B) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Burma, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act to support government labs and offices that work to combat infectious disease and to support government participation in nongovernmental organization-run civil society programs and Association of South East Asian Nations programs addressing vulnerable populations would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Cuba and Venezuela, that a partial waiver to allow funding for educational and cultural exchange programs described in section 110(d)(1)(A)(ii) of the Act that are related to democracy or the rule of law programming would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Iran, that a partial waiver to allow funding for educational and cultural exchange programs described in section 110(d)(1)(A)(ii) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to the Democratic Republic of the Congo, that assistance and programs described in section 110(d)(1)(A)(i) and 110(d)(1)(B) of the Act, with the exception of Foreign Military Sales and Foreign Military Financing, would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Venezuela, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act to support programs designed to strengthen the democratic process in Venezuela would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Equatorial Guinea, that a partial waiver to allow funding for programs described in section 110(d)(1)(A)(i) of the Act to support programs to study and combat the spread of infectious diseases and to

advance sustainable natural resource management and biodiversity would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Equatorial Guinea, that assistance described in section 110(d)(1)(B) of the Act would promote the purposes of the Act or is otherwise in the national interest of the United States;

Determine, consistent with section 110(d)(4) of the Act, with respect to Zimbabwe, that a partial waiver to allow funding for programs described in section 110(d)(l)(A)(i) of the Act for assistance for victims of trafficking in persons or to combat such trafficking, and for programs to support the promotion of health, good governance, education, agriculture and food security, poverty reduction, livelihoods, family planning, and macroeconomic growth including anticorruption, and programs that would have a significant adverse effect on vulnerable populations if suspended, would promote the purposes of the Act or is otherwise in the national interest of the United States;

And determine, consistent with section 110(d)(4) of the Act, with respect to Venezuela and Zimbabwe, that assistance described in section 110(d)(1)(B) of the Act, which:

(1) is a regional program, project, or activity under which the total benefit to Venezuela or Zimbabwe does not exceed 10 percent of the total value of such program, project or activity; or

(2) has as its primary objective the addressing of basic human needs, as defined by the Department of the Treasury with respect to other, existing legislative mandates concerning U.S. participation in the multilateral development banks; or

(3) is complementary to or has similar policy objectives to programs being implemented bilaterally by the United States Government; or

(4) has as its primary objective the improvement of Venezuela or Zimbabwe's legal system, including in areas that impact Venezuela or Zimbabwe's ability to investigate and prosecute trafficking cases or otherwise improve implementation of its anti-trafficking policy, regulations or legislation; or

(5) is engaging a government, international organization, or civil society organization, and seeks as its primary objective(s) to: (a) increase efforts to investigate and prosecute trafficking in persons crimes; (b) increase protection for victims of trafficking through better screening, identification, rescue or removal; aftercare (shelter, counseling) training and reintegration; or (c) expand prevention efforts through education and awareness campaigns highlighting the dangers of trafficking or training and economic empowerment of populations clearly at risk of falling victim to trafficking, would promote the purposes of the Act or is otherwise in the national interest of the United States.

* * * *

4. Money Laundering

a. Iran

See Chapter 16.A.2.b(1)(ii) for discussion of the designation of Iran as a jurisdiction of primary money laundering concern under Section 311 of the USA PATRIOT Act.

b. Lebanese Canadian Bank

On February 17, 2011, the Department of the Treasury, Financial Crimes Enforcement Network ("FinCEN") issued notice of its finding under § 311 of the USA PATRIOT Act, Pub. L. 107-56 that the Lebanese Canadian Bank SAL ("LCB") is a financial institution of primary money laundering concern. 76 Fed. Reg. 9403 (Feb. 17, 2011). Based on this finding, FinCEN also issued on the same day a notice of proposed rulemaking under § 311. 76 Fed. Reg. 9268 (Feb. 17, 2011). The rule proposed would impose a "special measure authorized by 31 U.S.C. § 5318A(b)(5). That special measure authorizes the prohibition against the opening or maintaining of correspondent accounts by any domestic financial institution or agency for or on behalf of a targeted financial institution." Excerpts from the notice of finding below explain the action (with footnotes omitted).

* * * *

B. The Lebanese Canadian Bank SAL

The Lebanese Canadian Bank SAL ("LCB") is based in Beirut, Lebanon, and maintains a network of 35 branches in Lebanon and a representative office in Montreal, Canada. The bank is eighth largest among Lebanese banks in assets and has over 600 employees. Originally established in 1960 as Banque des Activities Economiques SAL, it operated as a subsidiary of the Royal Bank of Canada Middle East (1968-1988) and is now a privately owned bank. LCB offers a broad range of corporate, retail, and investment products, and maintains extensive correspondent accounts with banks worldwide, including several U.S. financial institutions. As of 2009 LCB's total assets were worth over $5 billion.

LCB has a controlling financial interest in a number of subsidiaries, including LCB Investments (Holding) SAL, LCB Finance SAL, LCB Estates SAL, LCB Insurance Brokerage House SAL, and Dubai-based Tabadul for Shares and Bonds LLC. Additionally, LCB is the majority shareholder of Prime Bank Limited, a private commercial bank and the LCB subsidiary located in Serrekunda, Gambia. LCB owns 51% of Prime Bank while the remaining shares are held by local and Lebanese partners. LCB apparently serves as the sole correspondent bank for Prime Bank. For purposes of this document and unless expressly stated otherwise, references to LCB include the aforementioned subsidiaries.

C. Lebanon

Lebanon is a financial hub for banking activities in the Middle East and eastern Mediterranean and has one of the more sophisticated banking sectors in the region. There are 66 banks incorporated in Lebanon, and all major banks have correspondent relationships with U.S. financial institutions. The five largest commercial banks account for roughly 60% of total banking assets, estimated at $125 billion. According to Treasury information, strong economic growth and a steady flow of diaspora deposits in recent years have helped the Lebanese banking system to maintain relatively robust lending, improve asset quality, and maintain adequate liquidity and capitalization positions. However, banks remain highly exposed to the heavily indebted sovereign, carry significant currency risk on their balance sheets, and operate in a volatile political security environment.

Lebanon also faces money laundering and terrorist financing vulnerabilities, according to the International Narcotics Control Strategy Report ("INCSR") published in March 2010 by the

U.S. Department of State. Of particular relevance is the possibility that a portion of the substantial flow of remittances from the Lebanese diaspora, estimated at $7 billion—21% of GDP—in 2009, according to the World Bank, could be associated with underground finance and Trade-Based Money Laundering ("TBML") activities. Laundered criminal proceeds come primarily from Lebanese criminal activity and organized crime.

Lebanon's Customs Authority ("Customs") supervises two free trade zones operating in the country. However, high levels of corruption within Customs create vulnerabilities for TBML and other threats. Moreover, Lebanon has no cross-border currency reporting requirements, resulting in a significant cash-smuggling vulnerability. Finally, Lebanon has not acceded to the UN Convention for the Suppression of the Financing of Terrorism, though it has adopted laws domestically criminalizing any funds resulting from the financing or contribution to the financing of terrorism. However, such laws do not apply to Hizballah, which Lebanon considers to be a legitimate political party and resistance organization, and it is not subject to Lebanese anti-terrorist financing laws. The United States Government ("USG") designated Hizballah as a Foreign Terrorist Organization on October 8, 1997. Additionally, on October 31, 2001, Hizballah was designated by the USG as a Specially Designated Global Terrorist under Executive Order 13224.

II. Analysis of Factors

Based upon a review and analysis of the administrative record in this matter, consultations with relevant Federal agencies and departments, and after consideration of the factors enumerated in section 311, the Director of FinCEN has determined that LCB is a financial institution of primary money laundering concern. FinCEN has reason to believe that LCB has been routinely used by drug traffickers and money launderers operating in various countries in Central and South America, Europe, Africa, and the Middle East; that Hizballah derived financial support from the criminal activities of this network; and that LCB managers are complicit in the network's money laundering activities. A discussion of the factors relevant to this finding follows:

1. The Extent to Which LCB Has Been Used To Facilitate or Promote Money Laundering in or Through the Jurisdiction

The USG has information through law enforcement and other sources indicating that LCB—through management complicity, failure of internal controls, and lack of application of prudent banking standards—has been used extensively by persons associated with international drug trafficking and money laundering. According to this information, this international drug trafficking and money laundering network generally moves illegal drugs from South America to Europe and the Middle East via West Africa, with proceeds laundered through the Lebanese financial system, as well as through TBML involving used cars and consumer goods. Specifically, individuals mentioned below (with the assistance of close family members who are key participants in the global drug trafficking and money laundering network) are known to hold or utilize cash deposit accounts at LCB to move hundreds of millions of dollars monthly in cash proceeds from illicit drug sales into the formal financial system, as well as to coordinate the laundering of these funds through key foreign nodes of the network using LCB accounts. The bank's involvement in money laundering is attributable to failure to adequately control transactions that are highly vulnerable to criminal exploitation, including cash deposits and cross-border wire transfers, inadequate due diligence on high-risk customers like exchange houses, and, in some cases, complicity in the laundering activity by LCB managers.

For example, in this global narco-money laundering network, U.S.-designated Ayman

Joumaa has coordinated the transportation, distribution, and sale of multi-ton bulk shipments of cocaine from South America, and laundered the proceeds—as much as $200 million per month—from the sale of cocaine in Europe and the Middle East. In this criminal scheme, the proceeds have been laundered through various methods, including bulk cash smuggling operations and use of several

Lebanese exchange houses that utilize accounts at LCB branches managed by family members of other participants in the global money laundering network. Specifically, Ayman Joumaa deposits bulk cash into multiple exchange houses, including the one that he owns, which then deposit the currency into their LCB accounts. He or the exchange houses then instruct LCB to perform wire transfers in furtherance of one of two TBML schemes. For example, some of the funds move to LCB's U.S. correspondent accounts via suspiciously structured electronic wire transfers to multiple U.S.-based used car dealerships—some of which are operated by individuals who have been separately identified in drug-related investigations. The recipients use the funds to purchase vehicles in the United States, which are then shipped to West Africa and/or other overseas destinations, with the proceeds ultimately repatriated back to Lebanon. Other funds are sent through LCB's U.S. correspondent accounts to pay Asian suppliers of consumer goods, which are shipped to Latin America and sold and the proceeds are laundered through a scheme known as the Black Market Peso Exchange, in each case through other individuals referred to in this finding or via companies owned or controlled by them. According to USG information, Hizballah derived financial support from the criminal activities of Joumaa's network.

With respect to the exchanges and companies related to Ayman Joumaa, numerous instances indicate that substantial amounts of illicit funds may have passed through LCB. Since January 2006, hundreds of records with a cumulative equivalent value of $66.4 million identified a Lebanese bank that originated the transfer; approximately half of those were originated by LCB, for a cumulative equivalent value of $66.2 million, or 94%, thus, indicating that LCB probably is the favored bank for these exchange houses, particularly in the context of illicit banking activity. Similarly, a review of all dollar-denominated wire transfers with the two primary exchange houses either as sender or receiver between January 2004 and December 2008 showed 72% originated by one of the exchange houses through LCB.

Individual A, who owns a wide network of companies manufacturing or procuring consumer goods in Asia, Europe, and the Middle East, the Caribbean, and Lebanon, participates in this money laundering scheme by providing the consumer goods that are used for TBML, as described above. Despite his business being based in Asia, he is believed to have centralized his banking operations in Lebanon, particularly through the use of over 30 accounts at LCB. USG information shows Individual A receiving funds in his accounts from Ayman Joumaa, and exchanging funds with Latin American members of the network discussed below. Individual A is known to be in near daily communication with the bank from his professional base in Southeast Asia.

Individual B, based in Latin America, is part of a Lebanese drug trafficking organization that moves large quantities of drugs from Latin America to destinations throughout Africa, Europe, and the Middle East. For over a decade, Individual B and his family have been involved in a variety of TBML schemes with Latin American drug traffickers and Lebanese money launderers. In the criminal schemes, the individuals deposit the local currency proceeds from the sale of imported consumer goods to the accounts of local banks and convert them to hard currency.

This completes the Latin America-based Black Market Peso Exchange money laundering

cycle, and allows for the repatriation of proceeds for the Latin American drug producers. Individual B then uses accounts at LCB to exchange the funds—usually in suspiciously structured amounts—with previously mentioned individuals and other suspected criminals as part of the global money laundering network. Information available to the USG suggests that Individual B and his family members are supporters of Hizballah.

Additionally, USG information indicates that Individual C, connected to both drug trafficking and money laundering, has established a money exchange house in the same building as a key LCB branch. This exchange uses its LCB accounts to deposit bulk cash proceeds of drug sales and then wires the proceeds to U.S.-based used car dealers. Individuals managing this and another LCB branch—each of which houses key accounts accepting bulk cash from exchange houses or wiring funds for the TBML schemes described above—are family members of one of the aforementioned individuals running Asia-based TBML activities.

At least one of these individuals has family relationships and personal contact with key LCB managers, in some cases working directly with those managers to conduct his transactions. The USG has information indicating that a minority owner of the bank, who concurrently serves as General Manager, his deputy, and the managers of key branches are in frequent—in some cases even daily—communication with various members of the aforementioned drug trafficking and money laundering network, and they personally process transactions on the network's behalf. Additionally, LCB managers are linked to Hizballah officials outside Lebanon. For example, Hizballah's Tehran-based envoy Abdallah Safieddine is involved in Iranian officials' access to LCB and key LCB managers, who provide them banking services.

Finally, information available to the U.S. Government indicates that LCB's subsidiary, Gambia-based Prime Bank, is partially owned by a Lebanese individual known to be a supporter of Hizballah. In addition to Gambian nationals, Prime Bank serves Iranian and Lebanese clientele throughout West Africa.

2. The Extent to Which LCB Is Used for Legitimate Business Purposes in the Jurisdiction

LCB is one of 49 mostly private Lebanese banks that make up Lebanon's financial sector. LCB has maintained modest but steady growth since 2000, with total assets of more than $5 billion in 2009. LCB also appears to be aware of the risk posed by money laundering, as noted in its Anti-Money Laundering Policy Statement. A publicly available source also indicates that U.S. financial institutions maintain correspondent relationships with LCB, and it is likely that a high volume of those transactions through those accounts is legitimate. However, numerous instances have been identified where substantial volumes of illicit funds have passed through LCB. Thus, any legitimate use of LCB is significantly outweighed by the apparent use of LCB to promote or facilitate money laundering.

3. The Extent to Which Such Action Is Sufficient to Ensure, With Respect to Transactions Involving LCB, That the Purposes of the BSA Continue To Be Fulfilled, and To Guard Against International Money Laundering and Other Financial Crimes

As detailed above, FinCEN has reasonable grounds to conclude that LCB is being used to promote or facilitate money laundering, and is, therefore, an institution of primary money laundering concern. Currently, there are no protective measures that specifically target LCB. Thus, finding LCB to be a financial institution of money laundering concern, which would allow consideration by the Secretary of special measures to be imposed on the institution under Section 311, is a necessary first step to prevent LCB from facilitating money laundering or other financial crime through the U.S. financial system. The finding of primary money laundering concern will bring criminal conduct occurring at or through LCB to the attention of the

international financial community and further limit the bank's ability to be used for money laundering or other criminal purposes.

* * * *

c. Withdrawal of Finding: VEF Banka

On August 1, 2011, FinCEN withdrew a finding of primary money laundering concern and repealed the rule imposing a special measure relating to VEF Banka, a bank headquartered in Riga, Latvia. 76 Fed. Reg. 45,689 (Aug. 1, 2011). See *Digest 2006* at 249-52 for discussion of the original finding and notice of proposed rulemaking for VEF Banka. The notice in the Federal Register explained the reasons for FinCEN's action:

> On May 26, 2010, VEF Banka's Latvian banking regulator, the Financial and Capital Market Commission (the ''FCMC''), revoked VEF Banka's operating license on the grounds that the shareholders of the bank had not received authorization from the FCMC for the acquisition of qualifying holdings and the bank failed to ensure compliance with provisions of the Credit Institution Law. As a result, the shareholders had no decision-making rights and were unable to ''ensure prudent bank operations.'' The FCMC's decision to revoke VEF Banka's license was confirmed by the Senate of Latvia's Supreme Court on July 22, 2010 and terminated VEF Banka's ability to operate as a financial institution under Latvian law. On November 15, 2010, the Riga District Court issued a nonappealable order to begin liquidating the bank. The liquidation process is expected to be complete in one to two years and will result in the disposition of all of VEF Banka's assets, including its subsidiary, Veiksmes lizings.

d. U.S. prosecution of Thai nationals on money laundering charges

On September 9, 2011, the United States filed a brief in the U.S. District Court for the Central District of California opposing a motion to dismiss a criminal indictment that included money laundering charges. *United States v. Siriwan*, CR No. 09-81-GW (C.D. Cal.) The indictment, available at *www.justice.gov/criminal/fraud/fcpa/cases/siriwan/01-28-09siriwan-indictment.pdf*, charged two Thai nationals—a former official in the Thai government's tourism agency and her daughter—on several counts, including transmitting money outside the U.S. for the purpose of carrying on a specified unlawful activity ("SUA"), namely bribery of a foreign official and violation of Thai public corruption law. Indictment ¶ 32. The indictment alleged that defendants made arrangements with U.S. citizens Gerald and Patricia Green ("the Greens") to receive bribes in exchange for awarding tourism-related contracts. The charges were brought under U.S. law, including 18 U.S.C. § 1956(a)(2)(A), "International Promotion of Money Laundering" in the Money Laundering Control Act ("MLCA").

Among the arguments made by defendants in their motion to dismiss the indictment was the assertion that Thailand, rather than the United States, would be the proper forum for consideration of the charges. In the excerpt set forth below from the U.S. brief in

opposition to defendants' motion to dismiss, the United States elaborated on several reasons why the United States is the proper forum for the indictment: (1) the plain text of the MLCA rebuts the presumption against extraterritoriality; (2) the application of § 1956(a)(2)(A) to defendants does not violate international law; and (3) provisions in Thailand's Penal Code do not make Thailand the exclusive jurisdiction over the offenses in the indictment. The full text of the U.S. brief is available at *www.state.gov/s/l/c8183.htm*. Most footnotes and citations to the record in the case have been omitted from the excerpt that follows.

* * * *

D. THIS COURT IS THE PROPER FORUM FOR THE INDICTMENT

Defendants ask the Court to dismiss the Indictment on the basis of principles of statutory construction, international law and the Thai government's determined judgment that it has sole jurisdiction over the alleged corrupt acts of its officials. Defendants' arguments are without merit and should be flatly rejected. In support of their arguments, Defendants introduce concepts of customary international law (as set forth by the Restatement (Third) of Foreign Relations Law) in an attempt to convince this Court that because Thailand has initiated its own proceedings against the defendants for violations of its own laws, the United States lacks the ability to prosecute the defendants for completely separate violations of United States law, that are based, in part, on the same conduct.

In making these claims, Defendants disregard the plain language of U.S. statutes that specifically provide the appropriate jurisdiction for the charges set forth in the Indictment, mis-apply and distort customary international law in showing that the government's prosecution is "unreasonable," and completely ignore the firmly rooted and accepted practice of concurrent jurisdiction—enabling two nations to prosecute defendants if their conduct violates the laws of both nations. Moreover, contrary to defendants' assertions, Thailand has not exercised exclusive jurisdiction in this matter. Thailand's statue is merely an assertion of its own jurisdiction, it does not prevent the punishment of the same defendants by a foreign country (such as the United States) for violations of its own laws.

1. Defendants' Statutory Construction Analysis Fails: The Presumption Against Extraterritoriality Has Been Rebutted By Section 1956's Plain Text.

Defendants' motion to dismiss alludes only briefly to the presumption against extraterritoriality (the extraterritorial application of a statute). As the Supreme Court has recently reiterated, "[i]t is a longstanding principle of American law that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *Morrison v. National Australia Bank*, 130 S.Ct. 2869, 2877 (2010). However, this cannon of construction is "a presumption about a statute's meaning, rather than a limit upon Congress's power to legislate," *id.*, and may be rebutted by a "clear indication of extraterritoriality." *Id.* at 2883. *See also United States v. Felix-Gutierrez*, 940 F.2d. 1200, 1204 (citing *United States v. Bowman*, 260 U.S. 94, 98 (1922) (extraterritorial application of a statute can arise from Congress's expressed intent or by a proper inference from the nature of the offense)).

As discussed at length in Part B of this Response, Congress has expressly provided for extraterritorial jurisdiction through § 1956(f). This clear indication of extraterritorial scope in the

text of the statute is sufficient to overcome any presumption against extraterritoriality that might be implicated through a statutory construction analysis.

Defendants' reliance on the *Charming Betsy* canon of avoiding a construction of U.S. that conflicts with international law is similarly unfounded in this case. While the government agrees with the general proposition that,"[w]here fairly possible, a United States statute is to be construed as not to conflict with international law or with an international agreement with the U.S." *Munoz v. Ashcroft*, 339 F.3d 950, 958 (9th Cir. 2003) (quoting the Restatement, Section 114 and citing *Murray v. Schooner the Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)), the *Charming Betsy* canon is irrelevant for two reasons: first and most importantly, there is no ambiguity with Congress' intent. *See United States v. Yousef*, 327 F.3d 56, 92 (2d Cir. 2003)(*Charming Betsy* cannon applicable only when Congressional intent is ambiguous). In this case, there is absolutely no ambiguity in Congressional intent as Congress explicitly stated through § 1956(f) that criminal extraterritorial jurisdiction exists for MLCA offenses, including violations of § 1956(a)(2)(A) and (h). The Court thus has no need to look to the Restatement, statutory construction, or any other expression of customary international law, in this case. Secondly, and as discussed below, *Charming Betsy* is inapplicable because application of § 1956(a)(2)(A) to defendants' conduct does not create a conflict with international law or an international agreement.

2. Application of § 1956(a)(2)(A) to Defendants Does Not Violate Customary International Law

While there is no reason to do so, even if the Court were to consult customary international law in this case, the extraterritorial application of § 1956(a)(2)(A) through § 1956(f) falls well within those norms. Defendants' analysis of those principles is badly off the mark. International law requires no more from a nation's exercise of extraterritorial jurisdiction than that it comport with a recognized basis to prescribe and be reasonable. The application of § 1956(a)(2)(A) to defendants' money laundering activities easily meets those standards.

As applied by the Ninth Circuit, customary international law requires a two stage analysis: (1) whether a basis for jurisdiction to prescribe exists[30]30; and (2) whether the exercise of jurisdiction to prescribe is reasonable. *United States v. Vasquez-Velasco*, 15 F.3d 833, 840 (9th Cir. 1994). It is well-settled under customary international law that "a state has jurisdiction to prescribe law with respect to...conduct that wholly or in substantial part, takes place within it territory." Restatement § 401(a). Here, the defendants knowingly used the United States' financial system in order to promote two separate unlawful activities – the Greens' FCPA [Foreign Corrupt Practices Act] offenses as well as defendants' offenses against a foreign nation, that is, Thailand. Each is specifically enumerated as such within the MLCA and represents conduct, the promotion of which through international transfers of money from or to the United States, Congress has explicitly deemed criminal under the laws of **this** nation.

The financial transactions **in the United States** that defendants caused to promote those SUAs totaled close to $1,800,000 from 2002-2007. These international transfers originated from numerous bank accounts within the Central District of California and were transferred, at the express direction of defendant Juthamas Siriwan, to numerous bank accounts all over the world

[30] The Restatement description of customary international law distinguishes between jurisdiction to prescribe (a nation's jurisdiction to make its law applicable to a case) and jurisdiction to adjudicate (a nation's jurisdiction to subject persons to the process of its courts). *See* §§ 401(a),(b). Although defendants phrase their argument in terms of whether this court is the "proper forum," their real argument concerns U.S. jurisdiction to prescribe, as the authorities upon they rely makes clear.

in the name of defendant Jittisopa Siriwan – including bank accounts in Singapore, the United Kingdom, and the Isle of Jersey. A basis for jurisdiction plainly exists.

Defendants' arguments relate less to the basis of jurisdiction under customary international law and more to a challenge of the "reasonableness" of the government's prosecution. While this Court need not decide that the government's prosecution in this case is "reasonable," since Congress has clearly expressed its intention that the statute apply to conduct committed outside the United States, even if "reasonableness" under customary international law were at issue here, the government's prosecution of defendants entirely satisfies that standard. As demonstrated below, defendants' arguments rely on a distortion of the facts and self-serving proclamations that have little or no substance or support.[31]

Defendants' application of the Restatement's reasonableness factors does not in any way call into question the reasonableness of the Indictment or prosecution of defendants. Per § 403 of the Restatement, whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

(a) the link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
(b) the connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity to be regulated, or between that state and those whom the regulation is designed to protect;
(c) the character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
(d) the existence of justified expectations that might be protected or hurt by the regulation;
(e) the importance of the regulation to the international political, legal, or economic system;
(f) the extent to which the regulation is consistent with the traditions of the international system;
(g) the extent to which another state may have an interest in regulating the activity; and
(h) the likelihood of conflict with regulation by another state.

As set forth below, defendants' proffered arguments with respect to these factors fall well short of a showing of lack of "reasonableness."

Factor (a): In support of this factor, defendants boldly state that the "center of gravity" of events giving rise to defendants' culpability is in Thailand. In making this claim, defendants conveniently ignore the $1,800,000 defendants caused to be wired from the United States to bank

[31] Customary international law recognizes two additional bases for jurisdiction to prescribe: (1) jurisdiction on the basis of effect in the United States, *see* Restatement § 402(1)(c); and (2) the "protective principle." *See id.* § 402 cmt. F. Since the defendants used a bank in the United States to promote the SUAs, their conduct plainly had serious and harmful effects within this country. Consequently, jurisdiction under the "effects" basis is present and consistent with customary international law. In addition, the United States has a strong national interest in maintaining the integrity of its financial institutions by protecting them from being used to commit money laundering offenses in the United States to promote bribery of foreign government officials or commit offenses against foreign nations. These interests justify application of the "protective" basis of jurisdiction as well. *See, e.g.*, *Vasquez-Velasco*, 15 F.3d at 840-41 (applying 18 U.S.C. § 1959, violent crimes in aid of racketeering activity , to defendant's participation in murders of two Americans in Mexico comported with international law); *Felix-Gutierrez*, 940 F.2d at 1205-06 (conviction for being accessory after fact of murder of DEA agent, committed in Mexico, was consistent with international law). This case is on even stronger footing than those cited above, however, because the statute at issue here, § 1956(f), contains a clear Congressional expression of extraterritorial application, whereas the statutes applied in the cases above did not.

accounts all over the world. Defendants also conveniently ignore the much larger scope of activity in the United States that occurred as a direct result of defendant Juthamas Siriwan awarding contracts to the Greens from 2002-2006, such as the subcontracting with third party companies, and the creation of numerous shell companies to service the tourism contracts. They also fail to mention the significant activity that took place at the Los Angeles office of the Tourism Authority of Thailand in connection with awarding the contracts to the Greens. Moreover, while defendants would like to claim that since the film festival was held in Thailand there is a strong link to Thailand, the fact remains that the links are much stronger in the United States and abroad. Indeed, defendants' kickback money did not even make it back to Thailand.

Factor (b): Defendants' sole argument in this regard is that they are Thai citizens residing in their home country. Defendants fail to cite any authority that stands for the proposition that prosecution of a foreign national living in his or her own home country by itself, makes such prosecution unreasonable.

Factor (c): Defendants incorrectly claim in this category that as to "the underlying specified acts resting on Thai laws" that Thailand has "asserted the fullest jurisdiction consistent with international law." Defendants' further claim that the MLCA has limited jurisdiction. Both assertions are false. As discussed further in sub-part 3 below, defendants have provided no evidence that Thailand has asserted its jurisdiction over this matter in such a way that forecloses prosecution by the United States. Indeed, Thailand has yet to even consider the United States' interests in this matter as a request for extradition has not been transmitted. As for the scope of Untied States' jurisdiction, as discussed previously at length, §1956(f) provides ample jurisdiction to prosecute the defendants pursuant to the statutes charged.

Factors (d)-(f): Defendants have in fact affirmed the United States' own interests in prosecuting this case. As defendants state in their motion, "the United States has an interest in preventing its financial institutions from being used to launder proceeds of unlawful activity..." Defendants then attempt to attack that interest through arguments that once again fall back on their incorrect claims of the government's perceived lack of jurisdiction and/or defendants' claims that Thailand has exercised exclusive jurisdiction. Thailand's alleged assertion of exclusive jurisdiction will be addressed in sub-part 3 below.

Factor (h). Defendants here attempt to reconcile their admission that the United States has a legitimate interest in this area with their argument that Thailand has a superior interest. Despite defendants' desire for this to be a "tie-breaker" situation, it is not. On the contrary, there is no tie to be broken in this case. International law plainly recognizes that two sovereigns can reasonably prescribe the same conduct. See Restatement §403(3) & cmt d ("Exercise of jurisdiction by more than one state may be reasonable for example, when one state exercises jurisdiction on the basis of territoriality and the other on the basis of nationality; or when one state exercises jurisdiction over activity in its territory and the other on the basis of the effect of that activity in its territory").

Moreover, there is "no conflict of regulation by another state." Restatement § 403(2)(h). There is no tension between the Thai bribery laws and the extraterritorial application of § 1956(a)(2)(A). Thailand is pursuing allegations completely different from those of the United States. As stated in Part B of this Response, the government is **not** charging the defendants with violations of bribery or the offenses that serve as the SUAs being promoted. Defendants are charged with violating United States money laundering laws for promoting those offenses. That Thailand wishes to prosecute defendants for whatever violations of Thai law their conduct represents is not in any way in conflict with the prosecution of the defendants by the United

States for using its financial system to promote specified unlawful activities, in violation of § 1956(a)(2)(A). In addition, and as discussed further below, Section 9 of Thailand's Penal Code poses no conflict – concurrent jurisdiction among nations is a widely recognized and well accepted.

3. Section 9 of Thailand's Penal Code Is Not An Assertion By Thailand Of Sole Jurisdiction Over The Offenses In The Indictment.

Defendants' claim that Thai Penal Code Section 9 is an assertion of Thailand's superior interests or that it provides exclusive or sole jurisdiction in this matter so as to prohibit the United States from prosecuting the defendants is incorrect.

Contrary to defendants' suggestions, Thailand has not claimed a superior interest in this matter, nor has the Thai government, through Section 9 or otherwise, issued a "determined judgment that it has sole jurisdiction over alleged corrupt acts of its officials." Indeed, the United States has not received any indication, formally or informally, that Thailand has asserted sole jurisdiction over this matter, is claiming superior interests, or has otherwise expressed disapproval of the investigation leading up to the Indictment or the return of the Indictment. Thailand is well aware of the government's investigation into defendants' violation of United States' money laundering laws and has provided, via the Mutual Legal Assistance Process and at the government's request, materials in connection with the investigation and indictment of the defendants. Thailand has never claimed sole jurisdiction over these matters. It is up to Thailand, not the defendants, to make assertions of superior interests or sole jurisdiction.[***]

Defendants' reliance on Section 9 of the Thai Penal Code is entirely misplaced. Section 9 simply affirmatively states that government officials that commit offenses "as provided in Section 147 to Section 166 . . . outside the Kingdom shall be punished in the Kingdom." This statute does not imply or suggest exclusive jurisdiction—it is merely an assertion of its own jurisdiction. The statute does not prevent the punishment of the same defendants by a foreign country (such as the United States) for violations of its own laws. Even assuming that this was an assertion of sole jurisdiction for those offenses, this section in no way curtails the government's jurisdiction to prosecute defendants for violations of its money laundering laws. To reiterate, the government is **not** prosecuting the defendants for violation of Section 147 to Section 166 of the Thai Penal Code. Therefore, Section 9 is completely irrelevant to the jurisdiction of the United States in this matter.

Defendants' claims in this area also completely ignore the well-accepted practice of concurrent jurisdiction. As the Permanent Court of International Justice recognized in its seminal *Lotus* decision, customary international law permits concurrent jurisdiction. When a course of conduct crosses national borders "[i]t is only natural that each [nation] should be able to exercise jurisdiction and to do so in respect of the incident as a whole. It is therefore a case of concurrent jurisdiction." *The Case of the S.S. "Lotus,"* P.C.I.J., Ser. A, No. 10, at 30-31 (1927); *see also United States v. Corey*, 232 F.3d 1166, 1179 (9th Cir. 2000)("[t]hus, concurrent jurisdiction as such raises no eyebrows among international lawyers.") The Restatement itself notes that § 403(3) "applies only when one state requires what another prohibits, or where compliance with the regulations of two states exercising jurisdiction consistently with this section is otherwise

[***] Editor's Note: The U.S. brief relies on the declaration of the Deputy Chief in the Asset Forfeiture and Money Laundering Section of the Criminal Division of the U.S. Department of Justice for support of its representations about the government of Thailand's stand with respect to the indictment.

impossible. It does not apply where a person subject to regulation by two states can comply with the laws of both."). That type of conflict is simply not present here.

Moreover, purported tensions with Thailand arising from the extraterritorial application of § 1956(a)(2)(A) are best left to the political branches of the respective governments to sort out. *Id.* at n.9 ("we must presume that the President has evaluated the foreign policy consequences of such an exercise of U.S. law and determined that it serves the interests of the United States"); *accord* Restatement, § 403(3), cmt e ("Subsection (3) is addressed primarily to the political departments of government, but it may be relevant also in judicial proceedings").

In that vein, the United States and Thailand have an extradition treaty in force which will require the Thailand, through its own judicial process, to decide whether to approve defendants' extraditions. Extradition Treaty with Thailand, U.S.-Thail, Dec. 14, 1983, S. TREATY DOC. NO. 98-16 (1984). In addition, if the extraditions are approved by the judiciary, the Thai executive branch will decide whether to actually surrender the defendants to the United States. In considering the United States' extradition requests, Thai officials will, *inter alia*, determine if the defendants' money laundering activities charged in the Indictment constitute an extraditable offense under the treaty (Article 1). Thai officials, even if they approve the defendants' extraditions, could delay the surrender until any possible Thai prosecution and sentence has been completed (Article 12).

Perhaps most significantly, Article 4 of the treaty, entitled "Dual Jurisdiction," provides "The Requested State may refuse to extradite a person claimed for a crime which is requested by its laws as having been committed in whole or in part in its territory, or in a place treated as its territory, provided it shall proceed against the person for that crime according to its laws." This provision would allow Thailand to deny the United States requests for defendants' extraditions if they choose to prosecute them for money laundering. As a result, the extradition treaty provides established mechanisms for Thailand and the United States to accommodate any foreign relations concerns which either may perceive in this case.

Defendants' arguments and conclusory statements in this area are nothing more than an attempt to convince this Court to ignore the process for resolving the order of prosecution among nations (set out through the extradition process), ignore the statutory authority set out by Congress regarding extraterritorial application of the MLCA (as set forth by § 1956(h)), and distort the application of customary international law. There has been no violation of international law and defendants' motion should be denied.

* * * *

After the United States filed its brief in opposition to defendants' motion to dismiss, the court requested supplemental briefing on two issues. The section set forth below from the supplemental brief filed by the United States on December 2, 2011 addresses the second of those issues: defendants' argument that Thailand had "organic" or "exclusive" jurisdiction over the conduct alleged in the indictment. Most footnotes and citations to the record have been omitted. The full text of the brief is available at *www.state.gov/s/l/c8183.htm*.

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Defendants' assertions of Thailand's "organic" or "exclusive" jurisdiction in this matter, which they claim is contained in Title 9 of Thailand's Penal Code, are references to a concept that simply does not exist in international law. There is no such thing as organic or exclusive jurisdiction in international law. Further, Title 9 of Thailand's Penal code makes no such claim.

It is well settled that international law recognizes several principles whereby a nation may enact laws that apply extraterritorially. It is equally well settled that each nation has equal rights in this regard. That is, what one nation can do under international law, any other nation can similarly do—no one nation is superior to another. These internationally accepted principles for legislating extraterritorially apply only to a nation's ability to authorize jurisdiction for itself—not to unilaterally limit the jurisdiction of another nation. International law does not recognize any right or principle that allows a unilaterally preemption of jurisdiction which would prevent the United States (and anyone else) from asserting and protecting its important interests.

The issue of one nation attempting to unilaterally preempt another nation's ability to prosecute was addressed in the Permanent Court of International Justice ("PCIJ") in 1927 in *The Case of the S.S. Lotus*, P.C.I.J., Ser. A, No. 10 (1927), which established the fundamental rule of concurrent jurisdiction in international law. In *Lotus*, a collision occurred on the high seas between a French ship (Lotus), under the watch of Lt. Demons, a French citizen, and a Turkish ship. The Turkish ship was cut in two, sank, and eight Turkish nationals died. The Lotus continued on its original course to Constantinople. France, making arguments similar to defendants' arguments in this case, claimed that it had personal jurisdiction over Lt. Demons and that Turkey could had no jurisdiction to prosecute Lt. Demons under international law. *Id*. at ¶¶ 28, 32. The PCIJ refused to accept France's argument and held that "restrictions upon the independence of States cannot therefore be presumed." *Id*. at ¶ 44. The PCIJ further held:

> There is nothing to support the claim according to which the rights of the State under whose flag the vessel sails may go farther than the rights which it exercises within its territory...there is no rule of international law prohibiting the State to which the ship on which the effects of the offense have taken place belongs, from regarding the offense as having been committed in its territory and prosecuting accordingly. This conclusion could only be overcome if it were shown that there was a rule of customary international law which, going further than the principal stated above, established the exclusive jurisdiction of the State whose flag is flown...[I]n the Court's opinion, the existence of such a rule has not been conclusively proved.

Id. at ¶ 65-67. The PCIJ concluded as follows:

> It is only natural that each [State] should be able to exercise jurisdiction and to do so in respect of the incident as a whole. **It is therefore a case of concurrent jurisdiction**.

Id. at ¶ 86 (emphasis added).

As the above case demonstrates, defendants' claims of exclusive or organic jurisdiction do not exist in international law. Rather, concurrent jurisdiction is the accepted practice.

As the Ninth Circuit stated in *United States v. Corey*, 232 F.3d 1166, 1179 (9th Cir. 2000), "[C]oncurrent jurisdiction is well recognized in international law...two or more states may have legitimate interests in prescribing governing law over a particular controversy." Put simply, "[P]rosecution by a foreign sovereign does not preclude the United States from bringing criminal charges."[27] Even assuming conflicts between nations arise, as the court in Corey points out

[27] *United States v. Richardson et al.*, 580 F.2d 946, 947 (9th Cir. 1978)(denying motion to dismiss where defendant was already prosecuted in Guatemala for the same offense). *See also United States v. Guzman*, 85 F.3d 823, 826 (1st Cir. 1996)(holding that when a defendant in a single act violates the "peace and dignity" of two

"American courts have on numerous occasions managed conflicts arising when two nations had authority over the same issue." *Id*. These conflicts are often managed by treaty. "[I]ndependent nations cede their exclusive control over their territory through treaties, and the terms of those agreements [treaties] govern that concurrent authority." *Id*. at 1180.

Moreover, contrary to defendant's assertions, Thailand, through Title 9 of its Penal Code or otherwise, has not attempted to claim organic or exclusive jurisdiction over the offenses alleged in the indictment. According to defendants, Title 9 reads as follows:

> Government Officials commits the offences as provided in Section 147 to Section 166...outside the Kingdom shall be punished in the Kingdom

The term "exclusive" is nowhere to be found in the above statute. Defendants simply insert that term as if it were included. It is not. Likewise, the term "exclusive", "organic", or even "sole" nowhere appears in the Thai Supreme Court cases defendants cite, the Thai legislative history defendants cite, or their own Thai lawyer's declaration. The absence of any exclusivity language is consistent with the accepted principle that the concept does not exist in international law and shows that Thailand is simply providing for its *own* jurisdiction to prosecute its nationals when they commit crimes abroad.

* * * *

5. Organized Crime

See Chapter 16.A.7. for discussion of a new executive order and sanctions regime directed at transnational criminal organizations.

6. Corruption

The Fourth Conference of States Parties ("COSP") to the UN Convention Against Corruption ("UNCAC") convened from October 24-28, 2011 in Marrakech, Morocco. This was the first COSP since the adoption in 2009 of a peer review mechanism ("Review Mechanism") to promote implementation of the anti-corruption standards enshrined in the UNCAC. A State Department Media Note, issued on October 21st and available at www.state.gov/r/pa/prs/ps/2011/10/175964.htm, described the participation and support of the United States for the COSP and UNCAC:

> The United States supports and will be represented at the October 24-28 Conference of States Parties (COSP) to the UN Convention Against Corruption (UNCAC) in Marrakech, Morocco, where the 154 States Parties to the UNCAC[****] will discuss implementation of the Convention and ways to advance international efforts to prevent and fight corruption. The United States is committed to engaging with other countries on

sovereigns by breaking the laws of each, he has committed two distinct offences and can be prosecuted and punished for both.)

[****] Editor's note: As of May 10, 2012, the number of Parties to UNCAC had reached 160.

preventing and combating corruption, and contributed more than $1.5 billion for anti-corruption and good governance assistance around the globe in the last fiscal year.

The U.S. has also contributed significantly to the UN Office on Drugs and Crime towards implementation of the UNCAC, providing over $3.5 million in funding in the last three years. This fourth UNCAC COSP will focus on asset recovery; the prevention of corruption; international cooperation; and improving the Review Mechanism that was adopted at the third COSP in Doha in 2009 to review implementation of the UNCAC at the national level. The United States was one of the 27 countries selected to be reviewed in the first year of the first review cycle and is currently in the process of finalizing its report in consultation with its peer reviewers. The United States is committed to leading by example and will publish its entire report online once completed. Additional issues to be addressed at this COSP include the provision of technical assistance to help countries implement their UNCAC commitment and the participation of non-governmental organizations and international organizations as observers in the COSP.

Over 150 countries attended the Fourth COSP to the UNCAC. The United States worked closely with Egypt and like-minded governments to strengthen international cooperation on asset recovery and develop an efficient forum for practitioners to meet on international cooperation. The United States also led a successful effort to increase financial oversight and discipline relating to the use of UN regular budget funding for the Review Mechanism. The COSP adopted a resolution expanding the formal participation of international organizations, signatories and non-signatories in the review process and also the Morocco-sponsored "Marrakesh Declaration" on preventing corruption. The Parties accepted the Russian Federation's offer to host the sixth COSP in 2015 (Panama will host the fifth COSP in 2013) and decided that the seventh COSP will be held at the seat of the UN Secretariat in Vienna.

7. Piracy

a. Overview

In 2011, as this section discusses in detail below, the United States continued its active efforts to counter piracy off the coast of Somalia through various international initiatives and domestic prosecutions of individuals suspected of piracy and related offenses. On March 30, 2011, Assistant Secretary of State Andrew J. Shapiro addressed the International Institute for Strategic Studies on the topic of U.S. approaches to counter-piracy. Assistant Secretary Shapiro's remarks, excerpted below, are available in full at www.state.gov/t/pm/rls/rm/159419.htm. Assistant Secretary Shapiro described current multilateral and U.S. efforts to counter piracy and called for further steps, including announcing the United States' increased willingness to consider additional mechanisms, beyond national prosecutions, for punishing and deterring piracy.

* * * *

Despite two years of international political and naval coordination, the problem is growing worse. Last year, 2010, witnessed the highest number of successful pirate attacks and hostages taken on record. And thus far 2011 is on track to be even higher. Close to 600 mariners from around the world are being held hostage in the region, some for as long as six months. Tragically, four Americans were brutally murdered by Somali pirates just last month.

The attacks are more ruthless, more violent and wider ranging. Hostages have been tortured and used as human shields and blowtorches have been used to open safe haven areas on ships in order to seize crews, and hold them for ransom. Pirates currently hold around 30 ships, most for ransom.

As international action has been taken to address the challenge, the pirates have responded. The way pirates operate has become more sophisticated. In recent months the use of mother ships—which are themselves pirated ships with hostage crews—has extended the pirates' reach far beyond the Somali Basin. Mother ships launch and re-supply groups of pirates who use smaller, faster boats for attacks. They can carry dozens of pirates and tow many skiffs for multiple simultaneous attacks.

This has made pirates more difficult to interdict and more effective at operating in seasonal monsoons that previously restricted their activities. Somali pirates now operate in a total sea space of approximately 2.5 million square nautical miles, an increase from approximately 1 million square nautical miles two years ago. This increase makes it difficult for naval or law enforcement ships and other assets to reach the scene of a pirate attack quickly enough to disrupt an ongoing attack.

At Secretary Clinton's direction, we are intensively reviewing our counter-piracy efforts to determine an even more energetic and comprehensive approach to respond to piracy in the Arabian Sea, Gulf of Aden, and the Indian Ocean region. As we move forward, we are looking into many additional possible courses of action that seek to overcome the ongoing challenges of piracy.

In the near and mid-term, we plan to focus on several approaches that have the potential to significantly increase risks to the pirates while reducing by equal measure any potential rewards that they think they may gain. We are considering a broad range of options, from intensifying naval operations, to pursuing innovative approaches to prosecute and incarcerate pirates through innovative national and international approaches. Furthermore, we are looking at additional ways to more aggressively target those who organize, lead, and profit from piracy operations, including disrupting the financial networks that support them.

But before I go into depth on our way forward, let me discuss briefly the actions that are already underway.

To address the problem, the United States has, from the beginning, adopted a multilateral approach. Piracy affects the international community as a whole and can only be effectively addressed through broad, coordinated, and comprehensive international efforts. In January 2009, we helped establish the Contact Group on Piracy off the Coast of Somalia, which now includes over 60 nations as well as international and industry organizations, to help coordinate national and international counter-piracy policies and actions.

We have also developed an integrated multi-dimensional approach toward combating piracy that focuses on: security—through the projection of military power to defend commercial

and private vessels; prevention—through best practices measures conducted by the private sector; and deterrence—through effective legal prosecution and incarceration.

I'll now expand on each of these areas:

First, security. In an effort to prevent attacks, the United States established Combined Task Force 151—a multinational task force charged with conducting counter-piracy naval patrols in the region. The objective of this Combined Task Force is to secure freedom of navigation for the benefit of all nations. It operates in the Gulf of Aden and off the eastern coast of Somalia, covering an area of over one million square miles. In addition to this effort, we have a number of coordinated multi-national naval patrols off the Horn of Africa. NATO is engaging in Operation Ocean Shield, the European Union has Operation ATALANTA, and other national navies in the area conduct counter-piracy patrols as well. On any given day up to 30 vessels from as many as 20 nations are engaged in counter-piracy operations in the region, including countries new to these kinds of effort like China and Japan.

* * * *

The second area we have focused on is prevention. Any effective approach to combating piracy must involve the private sector. To prevent pirate activity, we have encouraged the commercial and private vessels to take action to prevent piracy before it happens. The shipping industry is increasingly implementing industry-developed "best management practices" to prevent pirate boardings before they take place. These guidelines were developed to identify self-protection measures that have proven successful in preventing boarding and seizure, and enabling rescues by naval forces when boarded. …

* * * *

We continue to discourage ransom payments and to actively seek to deny the benefits of concessions to hostage takers. The increase in attacks over the last year is a direct result of the enormous amounts of ransom now being paid to pirates. The United States has a long tradition of opposing the payment of ransom, and we have worked diligently to discourage or minimize ransoms. But many governments and private entities are paying, often too quickly and to the detriment of future victims, the escalating ransoms that enable the pirates' predatory behavior. Some consider it the cost of doing business. However, every ransom paid, which now averages $4 million per incident and has reached as much as $9.2 million dollars, further institutionalizes the practice of hostage-taking for profit and funds its expansion as a criminal enterprise. Since January 2010, Somali pirates received approximately $75-85 million in the form of ransom payments. Of course, companies want to get their crews, ships, and cargoes back, but we have to find a way to break this cycle of increasing the pirates' success and to shut down this ballooning criminal enterprise that makes piracy an increasingly lucrative profession, especially for the impoverished Horn of Africa.

Third, to deter piracy, effective legal prosecution is vital. We are urging all states to share the burden of prosecuting suspected pirates in their national courts, and incarcerating those convicted.

When attacks do occur, the international community needs effective and appropriate ways of dealing with captured pirates. Under international law, piracy is a crime of universal jurisdiction. This means that all states are authorized under international law to prosecute cases

of piracy, whether or not that state has a direct link to the event. We applaud the approximately 18 countries that have pursued the prosecution of almost 950 pirates in their national courts. However, despite this figure, a significant number of suspected pirates encountered by naval forces are still being released without being prosecuted, sometimes for lack of evidence. We have not seen evidence that the prosecutions to date have had a deterrent effect, probably not least because pirates are reaping enormous returns with relatively little risk.

In addition, many of the countries affected by piracy—flag states, states from where many crew members hail, and many of our European partners—have proven to lack either the capacity or the political will to prosecute cases in their national courts. Furthermore, states in the region that have accepted suspects for prosecution to date have been reluctant to take more, citing limits to their judicial and prison capacities and insufficient financial support from the international community. As a result, too many suspected pirates we encounter at sea are simply released without any meaningful punishment or prosecution, and often simply keep doing what they were doing. This is the unacceptable 'catch and release' situation that has been widely criticized, and for which we must find a solution.

This multi-dimensional approach, focusing on security by expanding naval activities, emphasizing prevention through encouraging best practice measures by the private sector, and providing a deterrent through legal prosecution, provides a solid framework for our counter-piracy efforts.

Unfortunately further action is needed. …

* * * *

In the near and mid-term we can focus on several approaches that have the potential to significantly increase risks to the pirates while at the same time reduce their potential rewards. We are considering a broad range of options. These center on four key areas: pursuing additional mechanisms to prosecute and incarcerate pirates; aggressively targeting those who organize, lead, and profit from piracy operations; exploring expanded military options that will not place undue risks or burdens on our armed forces; and intensifying efforts to encourage the shipping industry to employ best management practices.

First, on enhancing the prosecution and incarceration of pirates. One of our major efforts to counter piracy has been to find creative ways to increase the ability and willingness of other states to undertake what should be a national responsibility to hold criminals accountable for attacks on national interests. The United States has actively prosecuted pirates involved in attacks on U.S. vessels where there has been sufficient evidence to support the case. To date, that totals 26 persons involved in several attacks:

- the April 2009 attack on the MAERSK ALABAMA,
- attacks in April of last year on the USS NICHOLAS and the USS ASHLAND,
- and most recently, the attack in February that resulted in the killing of the four Americans on the QUEST.

Fourteen men, thirteen from Somalia and one from Yemen, have been indicted on federal criminal charges for their suspected involvement in this heinous incident. The Somali pirate convicted in the MAERSK ALABAMA attack received a sentence of 33 years and 9 months and the pirates involved in the NICHOLAS attack have received life sentences plus 80 years. These successful prosecutions, like the over 900 other national prosecutions taking place around the world, prove that pirates can be successfully prosecuted in any state with the basic judicial

capacity and political will to do so. [Editor's note: see section c below for updated information about U.S. prosecutions.]

Despite these successes, we need to acknowledge the reality that many states, to varying degrees, have not demonstrated sustained political will to criminalize piracy under their domestic law and use such laws to prosecute those who attack their interests and incarcerate the convicted. The world's largest flag registries—so-called "flags of convenience"—have proven either incapable or unwilling to take responsibility. And given the limited venues for prosecution, states have been reluctant to pursue prosecutions of apparent or incomplete acts of piracy, limiting our ability to prosecute suspects not caught in the middle of an attack.

It is true that suspected pirates have been successfully prosecuted in ordinary courts throughout history. Because of this, the Administration has previously been reluctant to support the idea of creating an extraordinary international prosecution mechanism for this common crime. Instead, the Administration has focused on encouraging regional states to prosecute pirates domestically in their national courts. However, in light of the problems I've described to you today, the United States is now willing to consider pursuing some creative and innovative ways to go beyond ordinary national prosecutions and enhance our ability to prosecute and incarcerate pirates in a timely and cost-effective manner. We are working actively with our partners in the international community to help set the conditions for expanded options in the region. In fact, we recently put forward a joint proposal with the United Kingdom suggesting concrete steps to address some of the key challenges we continue to face.

One of the most important things we must do is expand incarceration capacity in the region, as lack of prison capacity is perhaps the most common reason states are reluctant to accept pirates for prosecution. We are already seeing progress in this area. Just this week, a new maximum security prison opened in Northern Somalia to hold convicted pirates. We also support the efforts underway to develop a framework to accommodate the transfer of convicted pirates back to Somalia to serve their sentences in their home country.

In addition, we have suggested consideration of a specialized piracy court or chamber to be established in one or more regional states. The international community is currently considering this idea, along with similar models that would combine international and domestic elements. These ideas are under discussion both in the UN Security Council and in the Contact Group.

It is also critical to continue to support and enhance the prosecution-related programs in the region that are already underway. And we continue to believe one of the most vital aspects remains Somalia's long term ability to construct its own active and independent judicial system.

The second area we are considering is how to more effectively target financial flows from piracy, possibly by using approaches similar to the ones we use to target terrorists.

Somali piracy is an organized criminal enterprise, like a mafia or racketeering criminal organization. A key element of our overall counter-piracy approach is the disruption of piracy-related financial flows. We need to hit pirate supply lines—cutting them off at the source. A significant effort must be made to track where pirates get their fuel, supplies, ladders and outboard motors in Somalia and in other nearby countries and to explore means to disrupt this supply. Most importantly, we must focus on pirate leaders and financiers to deny them the means to benefit from ransom proceeds. They must be tracked and hunted by following the money that fuels their operations using all available information. This should include by tracing the money that fuels their operations with the same level of rigor and discipline we currently employ to combat other transnational organized crime.

This is particularly critical, considering the recent uncorroborated open source reports of possible links, direct or indirect, between al-Shabaab in Somalia—specifically al-Shabaab-linked militia—and pirates. Al-Shabaab and the pirates operate largely in separate geographic areas and have drastically opposed ideologies. However, we have seen reports that al-Shabaab is receiving ad-hoc protection fees from pirate gangs working in the same area. Obviously, this is concerning. Let me be clear: while we have seen no evidence to date of direct ties between the two groups, it would not be uncommon for criminal gangs working in the same ungoverned space to share resources or pay kickbacks to one another.

Finally, it is time to explore additional means to map and disrupt the financial flows and criminal masterminds behind the business of piracy before any links are solidified or money is put into the pockets of a group responsible for terrorist attacks. At the beginning of March, the United States hosted a meeting of Contact Group members at which the international community began discussing the development of methods to detect, track, disrupt, and interdict illicit financial transactions connected to piracy and the criminal networks that finance piracy. As we make progress and pirate leaders are identified, we should press local authorities in the piracy-affected region to take action against these leaders and either prosecute them or turn them over to other states for prosecution. Piracy is impacting Americans', Africans', and others' lives around the world, and we should devote resources commensurate to the problem.

The third area we are exploring for increased action involves additional ways to work with our Department of Defense colleagues to take further action at sea, focusing on steps that would have real impacts on pirate activity without overextending our military. For its part, the United States Navy is already taking proactive measures to remove pirate boats from action when they can do so without unduly risking human life or unnecessarily expending scare resources. Just last week, U.S. naval forces successfully answered a Philippine-flagged merchant vessel's distress call as pirates attempted to board. U.S. forces, already in the area as part of Operation Enduring Freedom, fired warning shots, causing the pirates to flee and foiling the attack. As American assets were already on the scene, the U.S. military was ready and able to respond without stretching our armed forces too thin.

We at the State Department need to continue to work with our DoD colleagues to explore using other tools at our disposal to further disrupt pirate vessels at sea. Of course, we must always act in a fashion that does not cause the situation on land in Somalia to worsen.

Fourth and finally, we must intensify our efforts to encourage commercial vessels to adopt best management practices. The best defense against piracy is vigilance on the part of the maritime industry. The vast majority of successful pirate attacks are against ships that do not adopt best management practices. The U.S. government requires U.S.-flagged vessels sailing in designated high-risk waters to take additional security measures, including having extra lookouts, having extra communications equipment, and being prepared at all times to evade or resist pirate boarding. I would note that, to date, not a single ship employing armed guards has been successfully pirated.

Combating piracy is not just the job of governments. It requires joint action from both the international community and the private sector. If all commercial fleets worldwide were to implement the measures as appropriate, we would be in a much better position to reduce the rate of successful pirate attacks. Our partners in the maritime industry must continue to step up and take further action to do their part.

* * * *

b. International support for efforts to bring suspected pirates to justice

In international fora, the United States continued to underscore the importance of bringing suspected pirates to justice and took steps to help states enhance their capacities to pursue prosecutions and incarcerate individuals convicted of piracy and piracy-related crimes.

(1) UN Security Council

The Security Council adopted three resolutions on piracy in 2011. U.N. Doc. S/RES/1976, U.N. Doc. S/RES/2015, and U.N. Doc. S/RES/2020. The United States actively supported the work of the Security Council to counter piracy and was responsible for drafting Resolution 2020. At a Security Council briefing on a report on piracy prosecution on January 25, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, welcomed many of the report's recommendations. Ambassador Rice's statement, excerpted below, is available in full at *http://usun.state.gov/briefing/statements/2011/155277.htm*.

* * * *

…[P]iracy off the coast of Somalia threatens us all. Captured crews are used as human shields or held for ransom. And the region faces higher prices for basic commodities. Piracy endangers the critical delivery of humanitarian aid. And the rising sums of illicit funds flowing into Somalia through ransom payments further destabilize the region and fuel the growth of organized crime and terrorism.

Many members of this Council participate in the Contact Group on Piracy off the Coast of Somalia, which has proved a flexible and efficient forum for coordination and information-sharing. Much is being done to combat piracy, from disseminating best practices to youth-employment projects. But plainly, much more work remains to be done.

As the report notes, industry adoption of best-management practices and naval operations off the coast of Somalia reduce the rate of successful pirate attacks. Several mechanisms can certify such steps. For example, measures are reviewed as part of the process whereby a vessel's security plan is approved under the International Ship and Port Facility Security Code. Under other International Maritime Organization provisions, such as the International Safety Management Code, documentation that a vessel has implemented the appropriate best practices can be issued. We welcome assistance in further encouraging the adoption of such best practices, and we encourage nations to contribute ships to patrol the waters off the Somali coast, as several of our fellow Council members have already done.

We also support the report's recommendation that targeted cooperation with Somaliland and Puntland be increased.

But the best long-term solution to piracy is a stable Somalia. So the United States supports a wide range of economic-development programs there, including micro-credit and good-governance initiatives. Tailored initiatives that actively involve the local community may do the most good.

The United States also agrees that prevention, prosecution, and incarceration are essential elements of any counter-piracy initiative. We strongly support the report's recommendations that

all states criminalize piracy, as defined in the United Nations Convention on the Law of the Sea, and adopt universal jurisdiction over this grave crime. The report recognizes the need to raise awareness, to encourage piracy's victims to testify against their attackers, and to explore means to provide such testimony, including via videoconference. We agree.

Mr. President, the United States has long encouraged flag states and states whose crews and vessel owners have fallen prey to pirates to pursue prosecutions in their domestic courts to the greatest extent possible. We welcome the report's call for all states to strengthen their commitment and ability to prosecute. In cases where American vessels have been attacked, we have prosecuted the suspects. We also recognize the need to develop one or more reliable, practical options for prosecution in the region. Kenya and the Seychelles are successfully prosecuting piracy cases in their national courts; Tanzania has changed its laws to allow it to prosecute suspected pirates captured elsewhere. These countries experience indicates that prosecution in the region is potentially viable. We should continue to support regional states' efforts to try suspected pirates in their national courts. Not only does such support help ensure that piracy bears judicial consequences, it also enhances the judicial capacity of the region as a whole. As we continue to discuss additional mechanisms, we should also support and strengthen prosecution-related programs in the region that are already underway.

My government also remains open to exploring creative solutions to increase and facilitate domestic prosecutions. The report suggests forming specialized piracy courts in Somaliland and Puntland, as well as a Somali court seated in another country in the region. We would support further consideration of these ideas including in the Legal Working Group on Piracy off the Coast of Somalia, which has been exploring prosecution mechanisms for some time now.

But as the UN report recognizes, incarceration may be the most significant constraint on piracy prosecutions. The UN Development Program and the UN Office on Drugs and Crime are supporting prison rehabilitation projects, but additional support and options for long-term incarceration are needed. We encourage states to work with and through UNODC to develop additional facilities where convicted pirates can serve their sentences. The lack of places to incarcerate convicted pirates significantly hinders additional national prosecutions and makes it harder to ensure judicial consequences for piracy.

Finally, as the report notes, we must pay more attention to the instigators, leaders, and financiers of piracy. We look forward to the conclusions of the next Contact Group plenary meeting about how to move forward. It is critical to disrupt the financial flows that make piracy both possible and profitable. To that end, the United States will convene on March 1st in Washington an ad hoc meeting of Contact Group participants on the financial aspects of piracy, as called for by the Contact Group, to develop a strategy and an action plan on this topic.

Mr. President, over the last few years, pirates have been using more and more violence. Their tactics have become more sophisticated, and their vessels have hunted further and further out at sea. We must work together and remain vigilant. In cooperation with the international community, the United States will do its part to combat this common and urgent threat.

* * * *

After the Security Council adopted Resolution 2015, the United States issued a press statement welcoming the steps taken in the resolution. The press statement, available at *www.state.gov/r/pa/prs/ps/2011/10/176231.htm*, included the following:

> The United States welcomes the UN Security Council's unanimous call to all nations in the world to continue their cooperation in the investigation and prosecution of all persons responsible for acts of piracy, armed robbery at sea, and Kidnap for Ransom off the coast of Somalia. This includes key figures of criminal networks involved in piracy who illicitly plan, organize, facilitate, or finance and profit from such attacks. We also welcome the further practical steps taken by the Council in support of national, regional and international efforts to prosecute pirates, and to enhance related prison capacity.
>
> This development is the latest indication of growing international consensus that these transnational criminals pose a serious shared security challenge for the safety and well-being of seafarers, global commerce and humanitarian aid.

(2) Contact Group on Piracy off the Coast of Somalia

In 2011, the United States continued to actively participate in the Contact Group on Piracy off the Coast of Somalia ("CGPCS" or "Contact Group"). See *Digest 2009* at 464-67 regarding the creation of the CGPCS and the website of the CGPCS, *www.thecgpcs.org*, for more information. Three plenary sessions were held in 2011 in March, July, and November. Communiques released at the conclusion of each session are available at *www.thecgpcs.org/plenary.do?action=plenaryMain#*. On November 17, 2011, the tenth plenary session of the CGPCS convened in New York. A State Department Media Note, available at *www.state.gov/r/pa/prs/ps/2011/11/177249.htm*, summarized the accomplishments of the Contact Group:

> Since its initial meeting in January 2009, the Contact Group has nearly tripled in size—a testament to the global consensus that piracy poses a shared security challenge to maritime safety and to the need for further concerted and coordinated international action. Among its accomplishments to date, the Contact Group has:
>
> - Facilitated coordination of international naval patrols through the operational coordination of an unprecedented international naval effort from more than 30 countries working together to protect transiting vessels. The United States coordinates in these efforts with other multilateral coalitions such as NATO's Operation Ocean Shield and the European Union's Operation ATALANTA. The United States also looks to further develop counter-piracy cooperation with several other nations deploying forces to the international counter-piracy effort, including China, India, Japan, and Russia.
> - Partnered with the shipping industry to improve practical steps merchant ships and crews can take to avoid, deter, delay, and counter pirate attacks. The shipping industry's use of Best Management Practices and the increasing use of Privately Contracted Armed Security Personnel are among these measures, which have proven to be the most effective deterrents against pirate attacks.

- Strengthened the capacity of Somalia and other countries in the region to combat piracy, in particular by contributing to the UN Trust Fund Supporting Initiatives of States Countering Piracy off the Coast of Somalia; and
- Launched a new initiative aimed at disrupting the pirates' financial and logistical networks ashore through approaches similar to those used to target other types of organized transnational criminal networks.

The Communique from the Tenth Plenary Session of the CGPCS in New York on November 17, 2011 is excerpted below and available in full at *www.thecgpcs.org/plenary.do?action=plenarySub&seq=19*.

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2 The CGPCS emphasized that close international coordination continues to be of central importance to effectively tackle piracy off the coast of Somalia and in the wider Indian Ocean. The CGPCS underlined that the ultimate responsibility to tackle piracy lies with Somalia. It welcomed significant developments in counter-piracy efforts by the international community since the Ninth CGPCS Plenary Session in July 2011.

In particular, it:

- stressed the international community's anger at the ongoing suffering of kidnapped innocent seafarers and reports of longer captivity periods and increasingly violent treatment at the hands of pirates, resulting in psychological, physical and medical stress, and expressed the unacceptability of this situation and its deep sympathy for the captive seafarers and their families, urged flag administrations to effectively engage with shipowners to provide information, including on the welfare of the crew, measures being taken for their release and the status of payment of their wages, to the substantially interested states so that the families can be kept informed, and called on the shipping industry to provide all necessary assistance to seafarers after their release;
- concluded that piracy continues to pose a serious threat, despite the positive trend of fewer ships and crew being held hostage since the Ninth CGPCS Plenary Session (10 ships and 240 crew were held hostage as of 17 November 2011, compared to 17 ships and 393 hostages in July 2011), as the number of attacks is still on the rise, albeit with a decreasing rate of success and that the situation requires continued strong engagement by the international community and sustained contributions to the military operations;
- therefore expressed its grave concern that the provision of military forces for the antipiracy operations is likely to fall short of the numbers required; and called upon states to remedy this situation;
- welcomed the start of the construction of the regional training center in Djibouti, which will be used to coordinate regional training as well as provide a venue augmenting existing training centres for training in the framework of the Djibouti Code of Conduct;

- noted the important deterrent role of military Vessel Protection Detachments (VPDs) in preventing vessels being pirated;
- noted the increased use of privately contracted armed security personnel (PCASP), as well as the fact that no vessel with PCASP on board has been successfully pirated, and the ongoing work in the IMO on guidance for the role of PCASP on board merchant vessels and the complementary efforts at self-regulation undertaken by the sector itself;
- reconfirmed the persisting need to facilitate criminal investigation and prosecution of apprehended pirates as a top priority for the CGPCS, as this is a requisite to the effectiveness of the anti-piracy coalition, and therefore welcomed the adoption of UN Security Council Resolution 2015 (2011), in which, inter alia, the UN Security Council decided to continue its consideration as a matter of urgency, without prejudice to any further steps to ensure that pirates be held accountable, of the establishment of specialized anti-piracy courts in Somalia and other States in the region with substantial international participation and/or support;
- expressed its appreciation for the valued efforts of Somalia, the Seychelles and Kenya and other countries in and outside the region in undertaking prosecutions and detaining convicted pirates, and encouraged other regional countries to contribute to these efforts and noted the need to look into the issue of communication between detained suspected pirates, Somali authorities and their families;
- stressed the urgent need to increase the number of prosecutions as a top priority and for all States to update their national legislation and relevant procedures, in order to actually undertake prosecutions, including of pirate leaders, financiers and organizers, whenever evidentiary standards are met;
- welcomed the new contributions of $4.9 million and outstanding pledges of about $1.3 million to the Trust Fund to Support Initiatives of States Countering Piracy off the Coast of Somalia in 2011, as well as the total contributions of $10 million received by the Trust Fund since its inception in January 2010, of which $6.9 million has been disbursed, and called on States as well as on the private sector to continue to contribute to the Trust Fund;
- confirmed its strong support for the Roadmap agreed by the Transitional Federal Government (TFG) and the regional administrations of Somalia in September 2011, and the need for its early and full implementation, including the urgent establishment of an Exclusive Economic Zone, consistent with international law, an agreed maritime security strategy, a coordinated maritime law enforcement capability, and the enactment of antipiracy legislation, as well as the building of capacity to prosecute, try and imprison piracy and maritime law cases, the appointment of a counter-piracy co-ordinator under a designated Minister and the development of programmes for anti-piracy community engagement and linked coastal economic projects;
- underlined therefore its support for the "Kampala Process", which ensures effective dialogue and co-ordination between Somali authorities, and made clear the need for UNPOS and the CGPCS to keep each other updated on current and planned activity in implementing these elements of the Roadmap, including

priorities and funding shortfalls, to enable donors to make best informed decisions, and further noted the United Nations' call to consider convening future meetings of the CGPCS and/or its Working Groups inside Somalia to strengthen coordination on the ground;

- acknowledged the important role of UNODC and UNDP in supporting Somali and regional authorities to prosecute and detain suspected pirates and the strengthening of the Somali judicial system as a whole, and stressed the importance of elaborating modalities for repatriation of piracy suspects who have been acquitted or those that have completed their prison terms;

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4 The CGPCS noted the announcement by the United States and the Republic of Korea that the Republic of Korea will take over the chairmanship of Working Group 3 in March 2012.

5 The CGPCS emphasized that adequate means must be provided to the international response to piracy, covering, amongst others: sufficient military assets to ensure an effective military response; furthering efforts of law enforcement and judicial agencies to effectively investigate and prosecute all those engaged in and profiting from piracy; stronger support from the international community for the development of prosecution and detention capacity in Somalia and in the region, to be provided, inter alia, through the Trust Fund, which the private sector is called upon to contribute to as well;

6 The CGPCS noted that a solution to piracy can only be found by combining the counterpiracy activities outlined above with the wider efforts aimed at stabilizing Somalia, which include promoting good governance and rule of law, strengthening the Somali government's institutions and fostering socio-economic development through a comprehensive, multi-faceted approach. The CGPCS therefore welcomed the engagement by the Special Representative of the Secretary-General for Somalia with the CGPCS and welcomed the strengthened cooperation between the CGPCS and the International Contact Group on Somalia.

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c. U.S. prosecutions

Domestically, the United States continued to pursue the prosecution of captured individuals suspected in several pirate attacks. As of March 2012, the United States had pursued the prosecution of 28 suspected pirates in U.S. courts for their involvement in five distinct attacks on U.S. ships or U.S. interests. Prosecutions resulted in 18 defendants receiving convictions, 16 of whom have been sentenced, and none have been acquitted. Prosecutions related to the five attacks on U.S. ships or interests are summarized below.

(1) M/V Maersk Alabama: In 2010, Abduwali Abddukhadir Musé was sentenced to 33 years and nine months of imprisonment for his role in the 2009 hijacking of the Maersk Alabama. He had pleaded guilty to felony counts of hijacking maritime vessels, hostage taking, and kidnapping.

(2) USS Nicholas: The five defendants who attacked the USS Nicholas were convicted and sentenced to imprisonment for life plus 80 years in November 2010. That case is

currently on appeal in the U.S. Court of Appeals for the Fourth Circuit.

(3) USS Ashland: The case of the defendants who attacked the USS Ashland is on interlocutory appeal in the Fourth Circuit because the district court dismissed the piracy charge in the case, although several other charges remain. One of the defendants involved in the USS Ashland attack, Jama Idle Ibrahim, a.k.a. Jaamac Ciidle, pleaded guilty in the U.S. District Court for the Eastern District of Virginia to charges relating to that attack, and he received a 30-year sentence in November 2010. Five other defendants are awaiting trial.

(4) CEC Future: Ciidle also pleaded guilty in the U.S. District Court for the District of Columbia to charges arising from his participation in the hijacking of the M/V CEC Future, a Danish-owned merchant ship, in the Gulf of Aden in November 2008. In April 2011, he received a sentence of 25 years' imprisonment for that attack. Also in the M/V CEC Future case, a Somali named Ali Mohamed Ali was arrested on April 20, 2011, and indicted for conspiracy to commit piracy and other charges that allege he acted as a negotiator on behalf of Somali pirates during the takeover of the M/V CEC Future. His trial is scheduled to begin in July 2012.

(5) S/V Quest: A federal grand jury in the Eastern District of Virginia indicted 13 Somalis and one Yemeni on March 8, 2011, with charges of pirating a yacht, the S/V Quest, and taking hostage four U.S. citizens, who were ultimately killed before their release could be secured. Eleven individuals arrested in connection with the attack on the Quest have pled guilty to piracy charges, including the leader of the pirates who attacked the Quest. Nine of the eleven who have pled guilty have been sentenced to life, two sentences are pending, and three defendants are awaiting trial. Also in the Quest case, the grand jury indicted piracy negotiator Mohammad Saaili Shibin, on charges of piracy, conspiracy to commit kidnapping, and weapons charges. Shibin was indicted also for his role in the M/V Marida Marguerite piracy.[*****]

C. INTERNATIONAL, HYBRID, AND OTHER TRIBUNALS

1. Overview

On December 14, 2011, United States Ambassador-at-Large for War Crimes Issues, Stephen J. Rapp, addressed the Assembly of State Parties ("ASP") of the International Criminal Court ("ICC") in New York on behalf of the United States observer delegation. Ambassador Rapp discussed not only the United States' ongoing engagement with the ICC, but other efforts by the United States to advance the goal of accountability for international crimes. Ambassador Rapp's remarks, excerpted below, are available in full at *www.state.gov/j/gcj/us_releases/remarks/179208.htm*.

[*****] Editor's note: On April 27, 2012, following a nine-day trial, a federal jury convicted Shibin. He faces life imprisonment at his sentencing, scheduled for later in 2012.

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The United States … welcomes the opportunity to work with … the newly elected Court officials—including Prosecutor-elect Fatou Bensouda and six new judges. We also wish to commend the tireless efforts of the search committee for the position of prosecutor in identifying and reviewing the qualifications of the candidates for this critical position.

…[A]t this, the tenth session of the ASP, we should take the opportunity to reflect on the progress the ICC has made in establishing itself as a standing forum for international justice, as well as on the challenges that lie ahead. As many of the ad hoc tribunals and courts draw to a close in the coming years, the ICC can become an even more important safeguard against impunity. And as the Court moves beyond its first trials into the next phase of its development, we should continue to focus on how to strengthen the global system of accountability for genocide, war crimes, and crimes against humanity. We must make good on our promise to victims of atrocities around the world: that with the institutionalization of international justice and the growth of complementary domestic mechanisms, they will be assured justice, and that accountability will help their communities emerge from violence toward peace, from lawlessness toward respect for the rule of law.

…[A]chieving the promise of accountability entails a holistic and wide-ranging approach. Most recently, consistent with the principle of positive complementarity, we have worked to bolster the capacity of national governments to ensure justice in the face of grave atrocities. We have lent resources to advise and assist national systems in countering some of the worst perpetrators of atrocity crimes, including assistance to prosecute sexual and gender-based violence. And although the United States is not a party to the Rome Statute, we are continuing to engage with the ICC and States Parties to the Rome Statute to end impunity for the worst crimes. Over the past several years, we have sent active observer delegations to the ASP sessions and the Review Conference in Kampala. We have actively engaged with the [Office of the Prosecutor ("OTP")] and the Registrar to consider specific ways that we can support specific prosecutions already underway, and we have responded positively to a number of informal requests for assistance. We supported the UN Security Council's ICC referral regarding Libya and are working hard to ensure that those charged by the Court there face justice consistent with international standards. From the DRC to Cote d'Ivoire, Darfur to Libya, we have worked to strengthen accountability for atrocities because we know, as President Obama has said, that "justice is a critical ingredient for lasting peace."

What are the concrete steps we can take to continue to advance this common cause?

First, at both the international and national levels, we should continue to recognize and promote the important role that justice and reconciliation play in resolving conflicts. Today, we do not have to look far to see evidence of this support. For example, since we last met in New York one year ago, the Security Council made history with its first unanimous referral to the ICC of the situation in Libya. Resolution 1970, adopted even as atrocities were being perpetrated, represented an historic milestone in the fight against impunity. The referral in Resolution 1970

has served to keep the principle of accountability in the fore of the effort to transition from authoritarianism to democracy in Libya. It is clear that justice and reconciliation efforts will now be critical components of a successful transition that allows all of Libyan society to leave behind what has been, in many respects, a tragic and bloody past.

Second, States must elevate as a priority the prevention of and response to mass atrocities, and work to marshal and coordinate their own capacities. Since we last addressed this Assembly, in August 2011, President Obama issued a presidential directive in which he identified the prevention of mass atrocities and genocide as a core national security interest, as well as a moral responsibility, of the United States. Accordingly, he directed the creation of an Atrocities Prevention Board to coordinate a whole-of-government approach to preventing and responding to genocide and mass atrocities. Ensuring justice and accountability is a key ingredient to resolving and preventing mass violence. Among many other efforts, the Board will work to coordinate and strengthen U.S. and multilateral efforts to prevent atrocities and achieve accountability.

On the same day President Obama announced this new effort, he also issued a Presidential Proclamation restricting entry into the United States of persons who participate in serious human rights and humanitarian law violations. Ensuring there is no safe haven for perpetrators of mass atrocities is key to establishing a mutually reinforcing world-wide network to combat impunity for the most serious crimes.

Third, the cooperation of States with the ICC is particularly crucial in two areas we have highlighted before and wish to stress again today: the protection of victims and witnesses; and the apprehension of those fugitives subject to ICC arrest warrants who currently remain at large.

Witness protection issues are of particular concern to the United States: we cannot ensure accountability for those who commit the most serious crimes unless security and protection are provided to witnesses and judicial officers. Witness protection is not just an ICC issue: it is a rule of law and domestic capacity issue, and a vital component of any successful justice program, domestic or international. Earlier today, Madame President, in collaboration with Denmark and Uganda, we co-hosted a side event to explore gaps and challenges in ensuring protection for victims, witnesses, and judicial officers who are on the front lines of demanding justice for perpetrators of heinous crimes. We hope the discussion will serve to highlight those challenges, help map the way forward—both for the ICC and in the domestic sphere—and encourage the international community to prioritize cooperation on this crucial issue.

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[I]t is a persistent and serious cause for concern that eight individuals who are the subject of existing ICC arrest warrants remain at large. The recent transfer of former President Laurent Gbagbo to The Hague to face charges of crimes against humanity is an important step forward. But the landscape remains challenging. Years after their warrants were issued, the suspects who currently remain at large all too often remain free to continue to commit serious human rights violations, which contributes to the cycle of impunity and persistent instability. The international community must demonstrate its respect for accountability, and should bring diplomatic pressure

to bear on States that would invite or host these individuals. In the past year, for example, the United States has opposed invitations, facilitation, or support for travel by President Bashir of Sudan, who, as you know, is the subject of an outstanding ICC arrest warrant but remains at large and continues to seek to travel across borders.

States can also lend expertise and logistical support to efforts to apprehend these fugitives. Last year in Kampala, the United States pledged to renew its commitments to support regional efforts to bring the leadership of the Lord's Resistance Army to justice, and to protect and assist civilians threatened by the LRA. In connection with this, I am pleased to be able to report that, with the consent of governments in the region, the United States recently sent a small number of U.S. military advisors to the region to assist the forces that are pursuing the LRA and seeking to bring its top commanders to justice. These advisors will not take direct action against the LRA, but will work in support of our regional partners in the field to strengthen information-sharing, enhance coordination and planning, and improve the overall effectiveness of military operations and the protection of civilians. The United States is also committed to working in coordination with the African Union and United Nations in this effort. The deployment of these advisors is part of a broader ongoing strategy to increase the protection of civilians, promote defections from the LRA and support disarmament, demobilization, and reintegration of remaining LRA fighters, and provide continued humanitarian relief to the affected communities. As President Obama has said, "Bringing these senior commanders to justice is a key component of creating a lasting peace in the region." The United States stands by the efforts of regional partners to do just that.

These efforts are part of a larger U.S. government commitment to support international criminal justice in its many forms. We support the continuing important work of the ad hoc tribunals, and look forward to the creation of the Residual Mechanism. We look forward to the successful completion of the important Karadzic, Mladic, and Hadzic cases, which will bring an important element of closure to the tragedy that consumed the Balkans in the 1990s. …

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2. International Criminal Court

a. Overview

On November 1, 2011, Frank E. Loy, Public Delegate, U.S. Mission to the United Nations, addressed the UN General Assembly in a plenary session following a report by President Song of the ICC. His remarks, available at *http://usun.state.gov/briefing/statements/2011/176932.htm*, are excerpted below.

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Although the United States is not a party to the Rome Statute, we remain steadfastly committed to promoting the rule of law and to the principle that those responsible for serious violations of human rights and international humanitarian law should be held to account. We will continue to

play a leadership role in righting these wrongs when they have been committed and, in concert with the international community, acting on early warning signs to prevent atrocities from occurring in the first place. We recognize that the International Criminal Court plays a key role in bringing perpetrators of the worst atrocities to justice.

We were pleased to cast our first vote in favor of an ICC referral by the UN Security Council earlier this year, which reflects our continued engagement with the ICC and States Parties to the Rome Statute to end impunity for the worst crimes. Just as we are engaging with States Parties on issues of concern, the Obama Administration also is supporting the ICC's prosecution of those cases that advance U.S. interests and values, consistent with the requirements of U.S. law.

We continue to support positive complementarity initiatives by assisting countries in their efforts to develop domestic accountability processes for Rome Statute crimes. The ICC, by its nature, is intended to examine only those accused of bearing the greatest responsibility for the gravest crimes within its jurisdiction and depends on states to complement the ICC's work with national-level prosecutions. In that regard, over the last year we supported efforts by the Government of the Democratic Republic of the Congo to draft legislation establishing specialized mixed courts and will continue to assist efforts to strengthen the capacity and independence of the Congolese judicial system in order to achieve justice for the victims of sexual violence and other grave crimes. We supported a pilot project in the DRC to protect witnesses and judicial officers in sensitive and challenging cases and are expanding this kind of witness-protection support and looking for additional ways to support domestic prosecutions in other countries. Despite the good work that has already been done, important challenges remain. In particular, reparations and coordinated and effective witness and judicial protection remain as key gaps that must be filled. Finally, my delegation's concerns about the amendments adopted last year at Kampala are well-known, and were set forth in last year's debate on this agenda item.

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b. Cote d'Ivoire

On April 12, 2011, President Obama called President Alassane Outtara to congratulate him on assuming his duties as the democratically elected president of Cote d'Ivoire and to emphasize the importance of accountability for alleged atrocities committed in Cote d'Ivoire, which has accepted the jurisdiction of the International Criminal Court. A readout of the call, available at *www.whitehouse.gov/the-press-office/2011/04/12/readout-president-obamas-call-president-alassane-ouattara-cote-divoire*, is excerpted below.

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President Obama offered support for President Ouattara's efforts to unite Cote d'Ivoire, restart the economy, restore security, and reform the security forces. The President reiterated his admiration for the extraordinary potential of the Ivorian people, and the two leaders discussed the importance of reestablishing normal trade and assistance relationships to jumpstart the Ivoirian private sector. The two leaders also reiterated the importance of ensuring that alleged atrocities are investigated and that perpetrators—regardless of which side they supported—are held accountable for their actions, and committed to support the roles of the United Nations commission of inquiry and the International Criminal Court in investigating abuses. President Obama welcomed President Ouattara's commitment to provide security and advance the aspirations of all Ivoirians, and said that the United States will be a strong partner as President Ouattara forms an inclusive government, promotes reunification and reconciliation, and responds to the current humanitarian situation.

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c. Libya

The United States and the United Nations took several steps in response to the violent repression of peaceful protests by the regime of Muammar al-Qadafi beginning in February 2011. Chapter 6 discusses Libya's suspension from the Human Rights Council. Chapter 9 discusses recognition and succession of the new regime in Libya. Chapter 16 discusses the use of sanctions to target the Qadafi regime. And Chapter 18 discusses the use of force in halting the violence against civilians in Libya. On February 26, 2011, the UN Security Council, acting under Chapter VII, unanimously adopted Resolution 1970 which was co-sponsored by the United States. U.N. Doc S/RES/1970. Among other things, Resolution 1970 referred the situation in Libya since February 15, 2011 to the ICC. This was the first affirmative vote by the United States for a referral to the ICC. On May 4, 2011, Ambassador Susan E. Rice, U.S. Permanent Representative to the United Nations, addressed the Security Council following a briefing by ICC Prosecutor Luis Moreno-Ocampo on his progress. Her remarks, available at *http://usun.state.gov/briefing/statements/2011/162531.htm*, are excerpted below.

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Mr. President, this Council unanimously decided in Resolution 1970 to refer the situation in Libya to the Prosecutor of the International Criminal Court. By doing so, the Council reflected the importance that the international community attaches to ensuring that those responsible for the widespread and systematic attacks against the Libyan people are held accountable.

The Prosecutor has highlighted the deeply troubling actions by the Libyan government and its security forces—including incidents in which Qadhafi forces fired at civilians, reports of torture, rape, deportations, enforced disappearances, the use of cluster munitions and heavy weaponry against civilian targets in crowded urban areas, and blocking humanitarian supplies. All of this underscores the gravity of what we are witnessing in Libya today. New reports make clear that the Qadhafi regime continues to directly target civilians. So the need for justice and accountability persists. These reports further underscore the message that we have repeated in

our statements and in our diplomatic efforts: Qadhafi has lost any and all legitimacy to lead Libya.

As the ICC process continues, it is important that the international community remain united in its commitment to protecting civilians and civilian-populated areas under the threat of attack, to ending violence against the Libyan people, and defending the universal rights we all share.

Mr. President, my government welcomes the swift and thorough work the Prosecutor has done. He has said that he plans to submit an application for an arrest warrant in the coming weeks. The specter of ICC prosecution is serious and imminent and should again warn those around Qadhafi about the perils of continuing to tie their fate to his. The Prosecutor has also indicated that further cases may be opened, as would be appropriate against individuals involved in further crimes that might be committed in the days ahead.

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On November 2, 2011, Ambassador Rice delivered remarks at the Security Council following ICC Prosecutor Moreno-Ocampo's second briefing on actions taken pursuant to Resolution 1970. Excerpts follow from those remarks, which are available in full at *http://usun.state.gov/briefing/statements/2011/176588.htm*.

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I would like to begin by thanking the Prosecutor for his informative briefing and for his important contributions to laying the foundation for seeking the justice that Libyans so deserve.

The Security Council's decision to refer the situation in Libya to the Prosecutor reflected the importance that the international community attaches to ensuring accountability for the widespread and systematic attacks against the Libyan people that began in the dark days of February. Resolution 1970, adopted even as atrocities were being perpetrated, represented an historic milestone in the fight against impunity.

Justice and reconciliation efforts will be critical components of a successful transition that allows all of Libyan society to leave behind what has been, in many, many respects, a tragic and bloody past. An effective criminal justice system, with a competent judiciary and safeguards to guarantee humane treatment and due process, is crucial to the future of Libya. The new government must ensure that the rule of law, treatment safeguards, and due process protections are firmly in place.

Helping the Transitional National Council implement its commitments to respect human rights—and to proper detention procedures that meet Libya's international obligations—must be a very high priority. We emphasize the importance of ensuring that the human rights of all in Libya—including former regime officials and detainees—are fully respected during and after this transition period.

The victims of Qadhafi's terrorism and their families in Libya—and also in the United States—now know definitively that the era of Qadhafi's violence has ended. Qadhafi engaged in countless barbaric acts, but this does not and cannot justify the apparently brutal way that he met

his death. We welcome the TNC's announcement of an investigation into Qadhafi's death and will look to it to follow through by undertaking an effective inquiry. Independent and impartial investigations into abuses committed in Libya on both sides are the first step in fulfilling the TNC's commitments to accountability and laying a foundation for a transition that embraces the rule of law. We remain deeply troubled by reports, including those mentioned by the Prosecutor, that sub-Saharan African migrants and others detained in ad hoc jails are being abused. Continued support by the international community, including through the UN Support Mission in Libya, will be vital to helping the Libyan people achieve the future they seek.

We must now move together to support the creation of an inclusive, democratic state in which all Libyans, of all backgrounds, have a future and an opportunity to participate in the rebuilding of their country.

We welcome the Prosecutor's report that the TNC is fully cooperating with his investigation in accordance with Resolution 1970, and we encourage other States in which individuals subject to ICC arrest warrants may be found to ensure that they are brought to justice. We encourage the Prosecutor to continue to consult with the TNC.

We urge the speedy apprehension of Saif al-Islam Qadhafi and of Abdullah al-Senussi, who remain at large in the region. They must be brought to justice in a legitimate process governed by the rule of law. Ensuring justice for those who have endured unspeakable atrocities will be crucial to Libya's ability to emerge from the ashes of dictatorship to become a country in which all of its citizens enjoy the full protection of the rule of law.

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d. Darfur

On December 15, 2011, Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative to the UN for Special Political Affairs, addressed a Security Council meeting on Darfur and the ICC at which Prosecutor Moreno-Ocampo presented his latest report pursuant to UN Security Council Resolution 1593, which referred the situation in Darfur since July 1, 2002, to the ICC. Ambassador DeLaurentis's remarks are excerpted below and are available in full at *http://usun.state.gov/briefing/statements/2011/178938.htm*.

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The United States places a high priority on promoting lasting peace for all of the people of Sudan. Accountability is an essential component for achieving this durable peace, and the absence of it not only harms the people of Darfur, but impedes stability in Sudan.

As this Council confronts the on-going aerial bombardments conducted by Sudanese Armed Forces in Darfur, Southern Kordofan, Blue Nile, and across the border in South Sudan, it is important to reflect on the incomplete nature of justice for crimes committed in Darfur. The need to ensure accountability for those responsible for genocide, war crimes, and crimes against humanity in Darfur is not just a moral imperative but a political one: the lack of accountability

for such actions remains a strong negative precedent that continues to influence the conduct of the parties today.

It is in this spirit that we thank Prosecutor Moreno-Ocampo for his report and briefing to the Council here today. We are deeply concerned by the portions of his report detailing allegations that could be part of "ongoing acts of genocide, war crimes, and crimes against humanity." In particular, we find deeply disturbing the reports being monitored by the Prosecutor's office of alleged attacks either targeting or indiscriminately affecting civilians by pro-government forces. These include allegedly indiscriminate shootings in North Darfur IDP camps as well as alleged kidnappings and executions in Abu Zereiga.

Once again, the report highlights the continued presence of children in various forces, including pro-government forces and rebel movements.

Like the Prosecutor, we continue to be concerned by ongoing reports of widespread sexual and gender-based violence in Darfur and of instances of victimization of female IDPs [internally displaced persons] and refugees.

Furthermore, we are troubled by reports of continued attacks on UNAMID, including the six UNAMID peacekeepers killed since the Prosecution's last report. We urge the Government of Sudan to investigate these attacks, which may amount to war crimes, and prosecute those individuals responsible.

We take note that on December 2 the Prosecutor requested that the ICC Pre-trial Chamber to issue an arrest warrant against Sudanese Defense Minister, Abdelrahim Mohamed Hussein, for his alleged responsibility for crimes against humanity and war crimes committed in Darfur from August 2003-March 2004.

We again remind states of the importance of ending impunity and cooperating fully with the investigations. We continue to call on the Government of Sudan and all other parties to the conflict in Darfur to cooperate fully with the ICC and its Prosecutor, as required by UN Security Council Resolution 1593 (2005). We are concerned with the continued non-cooperation by the Government of Sudan with these obligations, which is detailed in the Prosecutor's report.

We also strongly urge the Government of Sudan to uphold its commitments under the Doha Document for Peace in Darfur signed between the Government of Sudan and the Liberation and Justice Movement to ensure accountability. We strongly urge the parties to implement the Doha Document in a full and transparent manner.

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3. International Criminal Tribunals for the Former Yugoslavia and Rwanda

a. Overview

On June 6, 2011, Ambassador Rosemary A. DiCarlo, U.S. Deputy Permanent Representative to the United Nations, addressed the Security Council on the International Criminal Tribunal for the former Yugoslavia ("ICTY") and the International Criminal Tribunal for Rwanda ("ICTR"). Ambassador DiCarlo's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2011/165103.htm*.

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Mr. President, we open this debate on a day when Ratko Mladic is in The Hague. His capture, arrest, and transfer to the International Criminal Tribunal for the Former Yugoslavia is a milestone on the path to justice and reconciliation. We commend the Government of Serbia for apprehending Mladic, and we welcome President Tadic's statement about his country's commitment to apprehending the final ICTY fugitive, Goran Hadzic. Mladic's capture means that he will now have to answer to victims for his alleged crimes, including the genocide at Srebenica, Bosnia-Herzegovina in 1995. It puts perpetrators of mass atrocities on notice: they will be held accountable for genocide, war crimes, and crimes against humanity. We expect all UN member states to take the steps necessary to bring to justice those indicted by the Tribunals.

Mr. President, we welcome the steady progress the Tribunals for the former Yugoslavia and Rwanda have made to increase their efficiency. We urge both Tribunals to strive to complete their work at the earliest possible date. We are mindful of the importance of doing so without sacrificing the high standards of a fair trial. We urge the Presidents and the judges who act as managers of the courtrooms to take every measure to ensure that trials and appeals are both expeditious and fair.

These Tribunals and their predecessors have had genuine historical impact. The establishment last December of the International Residual Mechanism for Criminal Tribunals demonstrated that war-crimes fugitives cannot escape justice. The Residual Mechanism will allow for the completion of those functions that will necessarily outlast the Tribunals themselves. Transfers of cases to national jurisdiction have been made possible because States have further developed their judicial and investigative capacities. Programs such as the Joint European and ICTY Training Project for National Prosecutors and Young Professionals are welcome efforts to help build such long-term capacity.

Again, we applaud the Tribunals' work thus far, and we urge them to make the most efficient use of available resources. We also encourage the Tribunals to continue to work with the UN Secretariat and other relevant UN bodies to develop practical and effective methods, including retention measures, to address the staffing shortages and the problems of attrition highlighted in the Prosecutors' reports.

Mr. President, the United States calls on states in the former Yugoslavia to cooperate fully with the ICTY, which is both a legal obligation and a key to Euro-Atlantic integration. We welcome the Government of Croatia's continued strong record of cooperation with the ICTY and its commitment to continue to search for any additional information the Prosecutor requested.

Croatia provided crucial witnesses and documents in the important case against Ante Gotovina and others, which proved critical to the Tribunal's deliberations.

We appreciate Croatia's reaffirmation of its commitment to support the ICTY through the conclusion of its processes.

Let me turn now to the International Criminal Tribunal for Rwanda. The United States welcomes the May 2011 judgment in the case of former chief of staff of the Rwandan army, the former head of the military police, and the two former commanders of the reconnaissance battalion. This case was the second one concluded by the ICTR that involved the responsibility of former senior military officers. It represents an important step for the Rwandan people toward justice and accountability.

The United States also welcomes the recent apprehension of the fugitive Bernard Munyagishari in the Democratic Republic of Congo. We urge all states to cooperate fully with the ICTR in their efforts to locate and apprehend fugitives. We commend those countries that are cooperating with the ICTR to bring the remaining nine fugitives to justice. We encourage continued progress so that these fugitives can be swiftly arrested.

* * * *

On December 7, 2011, Ambassador Jeffrey DeLaurentis, U.S. Alternate Representative for Special Political Affairs, U.S Mission to the United Nations, addressed the Security Council on the ICTY and the ICTR. Ambassador DeLaurentis's statement, excerpted below, is available at *http://usun.state.gov/briefing/statements/2011/178480.htm*.

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Mr. President, since we last addressed the Council on the Tribunals, shortly after the arrest of Ratko Mladic, the last remaining fugitive under ICTY indictment—Goran Hadzic—was captured. We mark their capture, arrest, and transfer as one step—albeit a significant one—on the path to justice and reconciliation. But we understand that this is only one step on a long road to peace and justice.

Even as the ICTY is completing its mandate, and even as we look forward to the start of the Residual Mechanism, the ICTY is extremely busy, with proceedings in 15 cases against 35 persons. We are confident that President Meron and the Tribunal as a whole can meet the challenge of concluding those trials fairly and efficiently, while also coordinating the transfer of key functions from the Tribunal to the Residual Mechanism.

The ICTY recently held a conference to discuss what kind of legacy it is leaving for future generations. Among other things, the ICTY has shown that the international community can establish an effective judicial institution that will bring to justice those who perpetrate atrocities. The ICTY has in large part been a success because of the hard day-to-day work of its judges, prosecutors and staff, who are committed to their core mission of being an effective court and dispensing justice. The ICTY has shown that it can provide fair trials, that war crimes fugitives cannot escape justice, and that victims can now expect that those who commit crimes against civilians will be held to account.

Again, we note with appreciation the progress the Tribunal has made in ensuring that its procedures are both expeditious and fair—including doubling-up on staff and judges such that they work on more than one trial at a time. We note with appreciation the measures President Meron has outlined here today, and welcome his continued efforts to improve the work of the Tribunal.

Mr. President, the United States continues to call on states in the former Yugoslavia to cooperate fully with the ICTY. We encourage the Government of Serbia to continue its efforts to determine how Ratko Mladic and Goran Hadzic were able to avoid justice for so many years, and to take appropriate measures against their support networks. We also look forward to cooperation from the relevant countries in the region on the apprehension of Radovan Stankovic, who escaped in 2007 from prison in Bosnia and Herzegovina. In addition, we note the Government of Croatia's record of cooperation with the ICTY, and urge it to work to support the ICTY and continue to cooperate with the Prosecution.

Turning to the International Criminal Tribunal for Rwanda, the United States welcomes the June 24, 2011 judgment in the case against the former Minister of Women's Development and five others. The conviction of the former Minister of Women's Development is a significant milestone because it demonstrates that rape is a crime of violence that has been used as a tool of war by both men and women. The United States also welcomes the November 17, 2011 judgment in the case against the former Mayor of Kivumu, who had authority over the local police, yet failed to prevent the massacre of more than 1,500 people.

When we last addressed these issues in the Council in June, the United States welcomed the then-recent apprehension of fugitive Bernard Munyagishari in the Democratic Republic of the Congo. Now, 198 days after his arrest, the United States is discouraged that the nine remaining fugitives remain at large. Ensuring completion of the work of the Tribunal and smooth and efficient transition to the Residual Mechanism is not only the work of the Tribunal. Every member state has an obligation to apprehend the remaining fugitives. The United States, along with many others, is making a concerted effort to assist other nations in bringing these fugitives to justice. We ask all states to redouble their efforts and cooperate fully with the ICTR to locate and apprehend the remaining fugitives.

* * * *

b. International Criminal Tribunal for the Former Yugoslavia

(1) Arrests

As mentioned in the statements of Ambassadors DiCarlo and DeLaurentis above, several key arrests of suspects sought by the ICTY were made in 2011. On May 26, 2011, President Barack Obama issued a statement on the arrest of Ratko Mladic. Daily Comp. Pres. Docs. 2011 Doc. No. 00396 (May 26, 2011), p. 1. He said:

> Fifteen years ago, Ratko Mladic ordered the systematic execution of some 8,000 unarmed men and boys in Srebrenica. Today he is behind bars. I applaud President Tadic and the Government of Serbia on their determined efforts to ensure that Mladic was found and that he faces justice. We look forward to his expeditious transfer to The Hague.

> Today is an important day for the families of Mladic's many victims, for Serbia, for Bosnia, for the United States, and for international justice. While we will never be able to bring back those who were murdered, Mladic will now have to answer to his victims and the world in a court of law. From Nuremberg to the present, the United States has long viewed justice for war crimes, crimes against humanity, and genocide as both a moral imperative and an essential element of stability and peace. In Bosnia, the United States—our troops and our diplomats—led the international effort to end ethnic cleansing and bring a lasting peace. On this important day, we recommit ourselves to supporting ongoing reconciliation efforts in the Balkans and to working to prevent future atrocities. Those who have committed crimes against humanity and genocide will not escape judgment.

Secretary Clinton also issued a statement to the press welcoming the arrest of Mladic. In her statement, available at *www.state.gov/secretary/rm/2011/05/164353.htm*, Secretary Clinton, added:

> …we also send our deepest sympathies and extend our thoughts and prayers to all those who have suffered from the notorious acts charged to Mladic, particularly the genocide at Srebrenica in 1995. You have waited far too long for this day. This arrest cannot restore what you have forever lost, but we hope it will provide some comfort that this criminal is now behind bars.

Both the White House and Secretary Clinton similarly issued statements welcoming the arrest in July 2011 of Goran Hadzic, the final remaining fugitive indicted for atrocities by the ICTY. The White House statement, released July 20, 2011, is available at *www.whitehouse.gov/the-press-office/2011/07/20/corrected-statement-press-secretary-arrest-goran-hadzic*. It included the following:

> We hope that Goran Hadzic's arrest, coming less than two months after the arrest of fellow indictee Ratko Mladic, can bring some much needed closure to the victims of the crimes committed in Croatia, and their families, and elsewhere in the region. It also serves as yet another reminder to those around the world who carry out terrible crimes that their day, too, will come.
>
> Over the course of its 18-year history, the United States has been and remains a steadfast supporter of the ICTY and its critically important work. The arrests of Mladic and now Hadzic, the final two fugitives out of 161 individuals indicted by the court, will allow the ICTY, and the many professionals who have worked in its chambers, to finally complete their mandate on behalf of the victims and in pursuit of justice.

Secretary Clinton's statement similarly welcomed the arrest, thanked Serbian authorities, looked forward to Hadzic's transfer to The Hague for trial, and pointed out that none of the 161 individuals indicted by the ICTY had evaded justice. Her statement is available at *www.state.gov/secretary/rm/2011/07/168903.htm*.

(2) Amendments to United States Agreement on Arrest and Surrender

On July 5, 2011, the United States notified the ICTY that it had completed all domestic legal requirements for entry into force of certain amendments to the Agreement on Surrender of Persons between the U.S. and the ICTY, signed at The Hague on October 5, 1994. The Agreement, as amended on July 5, 2011, is available at http://www.icty.org/x/file/Legal%20Library/Member_States_Cooperation/implementation_legislation_united_states_1994_en.pdf. In November 2009, the United States proposed the amendments to include as extraditable offenses contempt of the Tribunal, false testimony under solemn declaration, and other offenses relating to the obstruction or interference with the administration of justice when such offenses are based on conduct subject to punishment by deprivation of liberty of more than a year if committed in the United States. On June 16, 2011, the ICTY replied by diplomatic note, accepting the proposed amendments and acknowledging that the amendments would enter into force upon notification from the United States that its domestic legal requirements had been met. Accordingly, the amendments entered into force with that notification on July 5, 2011.

(3) United States response to requests for documents by Radovan Karadzic

The United States filed several responses to the Trial Chamber in 2011 related to motions by Radovan Karadzic seeking orders for production of documents. In its January 10, 2011 filing relating to a request for certain documents, the United States emphasized that it had been cooperating with the "Accused's shifting and burdensome request" for documents and that the Trial Chamber need not involve itself in the process and should, accordingly, dismiss the motion. See Response of the United States of America to the Trial Chamber's 17 December 2010 Invitation to the United States of America, January 10, 2011, available at www.state.gov/s/l/c8183.htm.

Similarly, in its February 11, 2011 filing, the United States argued that the Trial Chamber should dismiss another motion by Karadzic because the United States was fully cooperating and keeping counsel informed of its efforts to provide documents in response to Karadzic's requests. The excerpt below from the February 11, 2011 U.S. response comprises the United States argument for dismissing the motion (with footnotes omitted). The U.S. response is available in full at www.state.gov/s/l/c8183.htm.

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The Appeals Chamber has held that binding orders against States are to "be reserved for cases in which they are really necessary." This is not one of those cases. In fact, Accused has failed to satisfy the threshold requirement that such a motion can only be filed *after* a State has declined to lend the requested support. Far from declining to lend support, the United States has gone to extraordinary efforts since first receiving Accused's information request to locate, to declassify as necessary, and to provide potentially responsive material. That lengthy and onerous process of cooperation, which has resulted in the transfer of hundreds of pages of documents, and which

involved significant back-and-forth, is nearly at an end: Only a single potentially responsive document remains in the balance.

The United States has explained to Accused the status of this final document, and the requirement for review by a third party. Third-party review is essential, since the document contains material classified by that third party for the protection of its security interest. We have also recently been made aware that the material may contain some classified material that potentially belongs to a fourth party. The United States is not in a position unilaterally to declassify sensitive materials that it does not own and that it did not originate—nor can or should it be compelled to do so.

In light of these circumstances, Accused's motion is without foundation. His impatience to receive this final material does not constitute an appropriate basis for the issuance of a 54*bis* order. That said, we understand that the third party is making efforts to complete its review as soon as possible, and we can assure the Court that when it does so, we will respond promptly to Accused. We have also contacted the potential fourth party to request an expedited review.

* * * *

On February 7, 2011, the Trial Chamber issued its decision denying the Accused's motion for a binding order. The Trial Chamber's decision is excerpted below (with footnotes omitted) and available in full at *www.state.gov/s/l/c8183.htm*.

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6. A party seeking an order under Rule 54 *bis* must satisfy a number of general requirements before such an order can be issued, namely: (i) the request for the production of documents under Rule 54 *bis* should identify specific documents and not broad categories of documents; (ii) the requested documents must be "relevant to any matter in issue" and "necessary for a fair determination of that matter" before a Chamber can issue an order for their production; (iii) the applicant must show that he made a reasonable effort to persuade the state to provide the requested information voluntarily; and (iv) the request cannot be unduly onerous upon the state.

7. With respect to (iii) above, the applicant cannot request an order for the production of documents without having first approached the state said to possess them. Rule 54 *bis* (A) (iii) requires the applicant to explain the steps that have been taken to secure the state's co-operation. The implicit obligation is to demonstrate that, prior to seeking an order from the Trial Chamber, the applicant made a reasonable effort to persuade the state to provide the requested information voluntarily. Thus, only after a state declines to lend the requested support should a party make a request for a Trial Chamber to take mandatory action under Article 29 and Rule 54 *bis*.

8. As stated above, binding orders can be issued only after the applicant has made reasonable efforts to persuade the state concerned to provide the requested information voluntarily, and then the state has refused to do so. In the present circumstances, the Chamber is satisfied that the U.S. has continuously cooperated with the Accused's requests since his original binding order motion of 11 September 2009. The Accused even submits that during the past year, the U.S. has been working diligently to resolve the issues relating to his numerous requests

and the process has resulted in the production of "218 documents by the United States and the withdrawal or narrowing of many of Dr. Karadzic's requests."

9. For this particular request, the U.S. notified the Accused that it found a potentially relevant document and is currently waiting for security clearance from the "third" and potentially "fourth party." The U.S submits that as soon as it receives responses from these parties, it will notify the Accused accordingly. The Chamber trusts that the U.S. will continue its diligent efforts to resolve this matter directly with the Accused as quickly as possible. Given that the U.S. is co-operating with the Accused for the production of the requested documents, and that it is in the interests of all parties involved that requests for documents are, if possible, dealt with on a voluntary basis, the Chamber considers that the Accused's Motion must fail on this basis alone.

* * * *

The United States produced the only remaining potentially relevant document discussed in the order above on April 11, 2011. The next day, on April 12, Karadzic filed another motion for a binding order for the United States to produce the requested material. The United States responded at the Trial Chamber's invitation with a filing on April 28, 2011, excerpted below and available in full at *www.state.gov/s/l/c8183.htm*. In its response, the United States requested that the motion be dismissed, observing that it was frivolous and vexatious and mischaracterized U.S. Congressional reports relating to alleged arms shipments to Tuzla in 1995, one of the subjects about which Kardzic had requested materials.

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* * * *

The Appeals Chamber has made clear that binding orders against States are exceptional measures for dealing with uncooperative States, should be "strictly justified by the exigencies of the trial," and should be "reserved for cases in which they are really necessary." This is patently not one of those cases.

Accused has failed to satisfy the threshold requirement that a 54*bis* motion can only be filed *after* a State has declined to lend the requested support. Far from declining to lend support, the United States has gone to extraordinary efforts since receiving Accused's information request. It has made diligent searches of its relevant holdings. It has declassified material as necessary, and coordinated with third-party originators as appropriate. The United States has now provided to Accused all the potentially responsive documents it has located I response to his lengthy information request, including all the potentially responsive documents it has found on the alleged Tuzla flights, and it has more than once informed Accused of that fact.

Accused's Motion seeks to cast doubt on these good-faith representations of the United States. It asks the Trial Chamber to order the United States to produce the allegedly missing material, or, in the alternative, to require the United States to produce affidavits affirming that it cannot locate it.

Accused's request, however, is without foundation. Indeed, his Motion has mischaracterized materials the United States has provided to him. As a result, the Motion asks the Chamber to issue a binding order against the United States for alleged "missing reports" that

it is not clear were ever created, to substantiate events that appear never to have occurred, in order to establish the identity of those responsible for those non-events.

The United States stands by the assertions it made in its February 11 filing with the Court regarding the searches it has made in regard to this document request. Nevertheless, in order to assists the Trial Chamber, the United States has attached a further statement regarding the searches it has made. The Statement makes clear that the United States has cooperated fully on this request.

* * * *

c. International Criminal Tribunal for Rwanda

On June 24, 2011 the ICTR handed down several convictions, including one against the former Minister of Women's Development in Rwanda, Pauline Nyiramasuhuko, on charges of genocide and rape as a crime against humanity, among other crimes. A June 25, 2011 State Department Press Statement, available at *www.state.gov/r/pa/prs/ps/2011/06/167079.htm*, highlighted the significance of the convictions:

> The United States welcomes the June 24 International Criminal Tribunal for Rwanda (ICTR) conviction of Pauline Nyiramasuhuko, former Rwandan Minister of Women's Development and her son, Arsene Shalom Ntahobali, both of whom were convicted for genocide and rape as a crime against humanity, among other crimes. The court also convicted former civilian officials Sylvain Nsabimana, Joseph Kanyabashi and Élie Ndayambaje and former Lt. Colonel Alphonse Nteziryayo, as part of the same indictment. The court sentenced Nyiramasuhuko, Ntahobali and Ndayambaje to life imprisonment, and Kanyabashi, Nteziryayo and Nsabimana to 35, 30 and 25 years respectively.
>
> This ruling is an important step in providing justice and accountability for the Rwandan people and the international community. This conviction is a significant milestone because it demonstrates that rape is a crime of violence and it can be used as a tool of war by both men and women. Nyiramasuhuko was convicted for her role in aiding and abetting rapes and for her responsibility as a superior who ordered rapes committed by members of the Interahamwe militia.
>
> There are still nine ICTR fugitives at-large and the United States urges all countries to redouble their cooperation with the ICTR so that these fugitives can be expeditiously arrested and brought to justice.

Later, in November 2011, the ICTR rendered its judgment against the former mayor of the Rwandan town of Kivumu. A November 18, 2011 State Department Press Statement, available at *www.state.gov/r/pa/prs/ps/2011/11/177351.htm*, explained:

> Yesterday the International Criminal Tribunal for Rwanda (ICTR) convicted Gregoire Ndahimana, former Rwandan Mayor of Kivumu, for genocide and crimes against humanity. The court sentenced Ndahimana to 15 years.
>
> The United States welcomes this ruling as an important step in providing justice and accountability for the Rwandan people and the international community. The conviction of Mr. Ndahimana is of particular significance, because as mayor of Kivumu he had authority over the police, and yet failed to prevent the massacre of more than 1,500 people who sought refuge and protection in Nyange Church. Militia, police, civil and religious authorities participated in bulldozing the church, burying the refugees sheltered inside.
>
> There are still nine ICTR fugitives at-large and the United States urges all countries to redouble their cooperation with the ICTR so that these fugitives can be expeditiously arrested and brought to justice.

Finally, on December 21, 2011, the ICTR convicted the former president and vice president of the National Republican Movement for Democracy and Development ("MRND") on charges of conspiracy to commit genocide, among other charges. In a December 27, 2011 State Department Press Statement, available at *www.state.gov/r/pa/prs/ps/2011/12/179717.htm*, the United States also welcomed the issuance of these judgments:

> On December 21, 2011, the International Criminal Tribunal for Rwanda (ICTR) convicted Mathieu Ngirumpatse, former National Republican Movement for Democracy and Development (MRND) President, and Edouard Karemera, former Minister of Interior and former MRND Vice President, on charges of conspiracy to commit genocide, direct and public incitement of genocide, crimes against humanity and serious violations of Article 3 Common to the Geneva Conventions and Additional Protocol II. Due to their role in a joint criminal enterprise "to destroy the Tutsi population," the Trial Chamber found Ngirumpatse and Karemera responsible not only for their own criminal acts, but also for the criminal acts committed by others as part of that enterprise, including widespread rape and sexual assault against Tutsi women and girls. The court sentenced Ngirumpatse and Karemera to life in prison. Co-defendant Joseph Nzirorera, former Secretary General of the MRND, passed away July 1, 2010.
>
> The United States welcomes this ruling as an important step in providing justice and accountability for the Rwandan people and the international community. The defendants were among the leadership of the dominant party in the interim government, the same party that established the Interahamwe militia, which played a leading role in the 1994 genocide.

There are still nine ICTR fugitives at-large, and the United States urges all countries to redouble their cooperation with the ICTR so that these fugitives can be expeditiously arrested and brought to justice.

4. Special Tribunal for Lebanon

On January 17, 2011, the Office of the Prosecutor for the Special Tribunal for Lebanon filed an indictment relating to the assassination of former Prime Minister Rafiq Hariri and 22 others. Both Secretary Clinton and President Obama issued statements welcoming the issuance of the indictment. Secretary Clinton's January 17, 2011 statement is available at *www.state.gov/secretary/rm/2011/01/154713.htm*. She said:

> Today's action by the Prosecutor for the Special Tribunal for Lebanon is an important step toward justice and ending impunity for murder. Those who oppose the Tribunal seek to create a false choice between justice and stability in Lebanon; we reject this.
>
> We are confident that the Tribunal will continue to operate according to the highest standards of judicial independence and integrity. We call on all parties to promote calm and continue to respect the Tribunal as it carries out its duties in a professional and apolitical manner.
>
> The United States and all friends of Lebanon stand together in support of its sovereignty and independence. While great progress has been made since this deadly attack in 2005, it will be impossible to achieve the peace and stability that the people of Lebanon deserve unless and until the era of impunity for political assassinations in Lebanon is brought to an end.

The January 17, 2011 White House Statement, Daily Comp. Pres. Docs. 2011 Doc. No. 00030, p. 1, similarly welcomed the issuance of the indictment and called for continued progress by the Tribunal:

> I welcome the announcement by the Office of the Prosecutor for the Special Tribunal for Lebanon today that he has filed an indictment relating to the assassination of former Prime Minister Rafiq Hariri and 22 others. This action represents an important step toward ending the era of impunity for murder in Lebanon, and achieving justice for the Lebanese people. I know that this is a significant and emotional time for the Lebanese people, and we join the international community in calling on all Lebanese leaders and factions to preserve calm and exercise restraint. The United States is a strong friend of Lebanon and we stand steadfastly with others in support of Lebanese sovereignty, independence, and stability.
>
> The Special Tribunal for Lebanon must be allowed to continue its work, free from interference and coercion. That is the way to advance the search for the truth, the cause of justice, and the future of Lebanon. Those who have tried to manufacture a crisis and force a choice between justice or stability in Lebanon are offering a false choice, as the Lebanese people have a right to both justice and stability, and efforts to undercut the STL only legitimize its efforts and suggest its opponents have something to hide. Any

attempt to fuel tensions and instability, in Lebanon or in the region, will only undermine the very freedom and aspirations that the Lebanese people seek and that so many nations support. At this critical moment, all friends of Lebanon must stand with the people of Lebanon.

In July 2011, Secretary Clinton issued another statement calling attention to the importance of the confirmation of the indictments by the Special Tribunal for Lebanon. Her July 1, 2011 statement is available at *www.state.gov/secretary/rm/2011/07/167488.htm* and appears below:

The United States congratulates the Special Tribunal for its hard work on completing this important step. We understand that this is an emotional and significant period for all involved, and we call on all parties to promote calm and continue to respect the Special Tribunal as it carries out its duties in a professional and apolitical manner.

The confirmation of the indictments by the pre-trial judge and their delivery by the Special Tribunal to the Lebanese authorities is an important milestone toward justice and ending a period of impunity for political violence in Lebanon. We call on the Government of Lebanon to continue to meet its obligations under international law to support the Special Tribunal.

The Special Tribunal is an independent judicial entity, established by an agreement between the Lebanese Government and the United Nations in response to a very difficult time in Lebanon's history. Its work is legitimate and necessary. It represents a chance for Lebanon to move beyond its long history of political violence and to achieve the future of peace and stability that the Lebanese people deserve. Those who oppose the Special Tribunal seek to create a false choice between justice and stability. Lebanon, like any country, needs and deserves both.

5. Khmer Rouge Tribunal ("ECCC")

In 2011, the United States continued to support the work of the Extraordinary Chambers in the Courts of Cambodia ("ECCC"), also known as the Khmer Rouge Tribunal. On June 27, 2011, Ambassador Rapp traveled to Cambodia for the beginning of the trial in Case 002. His remarks delivered in Phnom Penh are available at *www.state.gov/j/gcj/us_releases/remarks/167209.htm*. Ambassador Rapp stated:

It's great to be here for the beginning of this trial, to see it starting; this is at this time the most important trial in the world. It involves four people who were in the leadership of a government allegedly responsible for murdering 25 percent of their population, almost two million victims. It really is a case of tremendous importance to this country, because this crime affected everybody here, an effort to take this country back to year zero, and people not knowing exactly what happened, why it happened, and how it happened and I think this case will help answer these questions.

> I think that for the Cambodian society, it's extremely important, and then for the world, it's important. After Nuremberg, for 45 years there really wasn't any international justice, and it began again in the former Yugoslavia, and now we have a situation where whenever there are atrocities against civilians, people say there's got to be accountability and when cases like this happen, when (Ratko) Mladic is brought in even 15 years after Srebrenica, it's a message to others who might commit similar crimes, that there are going to be consequences. That it may not happen tomorrow or the next day, but eventually, you'll be in the dock as well.

On July 29, 2011, Deputy Secretary of State Thomas R. Nides certified that the United Nations and Government of Cambodia are taking credible steps to address allegations of corruption and mismanagement within the ECCC. 76 Fed. Reg. 50,808 (Aug. 16, 2011). Deputy Secretary Nides provided the certification pursuant to Section 7071(c) of the Department of State, Foreign Operations, and Related Programs Appropriations Act, 2010. See *Digest 2010* at 145 for background on the certification requirement.

On October 14, 2011, the United States announced the delivery of additional U.S. funding to support the ECCC. The announcement, available at www.state.gov/j/gcj/us_releases/other/175540.htm, also summarized recent activity at the ECCC, as set forth below.

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Stephen J. Rapp, U.S. Ambassador at Large for War Crimes Issues, announced today the delivery of $1.65 million to support the Extraordinary Chambers in the Courts of Cambodia (ECCC), also known as the Khmer Rouge Tribunal. This is the first of three installments of a projected contribution of $5 million during the current fiscal year to fund the international portion of the tribunal's staff and operations.

This donation comes as the ECCC begins the trial of its Case 002 in which the most senior surviving members of the Khmer Rouge government stand accused of crimes that resulted in the deaths of 1.9 million people between 1975 and 1979. "Given the gravity of the alleged crimes and the level of defendants, this is now the most important trial in the world," said Ambassador Rapp.

The ECCC Trial Chamber began hearings on legal and procedural issues in the trial of Case 002 in June 2011. It is expected to begin hearing witness testimony in November 2011. In July 2010 it rendered judgment in Case 001, finding Kaing Guek Eav, a/k/a Duch, guilty of crimes against humanity and grave breaches of the 1949 Geneva Conventions, and sentenced him to 35 years in prison. Among other crimes for which he was convicted, Duch acknowledged involvement in the executions of over 12,000 prisoners. Both Duch and the prosecution have appealed the trial judgment and the Supreme Court Chamber is expected to render its decision in December 2011.[*] The International Co-Prosecutor has requested investigations of five additional suspects, and proceedings in these matters, known as Cases 003 and 004, are before the Co-

[*] Editor's note: The Supreme Court Chamber issued its judgment on February 3, 2012, which, *inter alia*, changed Duch's sentence to life imprisonment.

Investigative Judges and Pre-Trial Chamber.

"The United States has been a strong supporter of efforts to bring to justice senior leaders and those most responsible for the atrocities committed under the Khmer Rouge regime in Cambodia," said Ambassador Rapp. "For the sake of the victims of these crimes, it is essential that proceedings in all matters over which that tribunal has jurisdiction be conducted fairly, expeditiously, and independently." The United States calls upon all interested parties to publicly re-affirm their support for the Tribunal's independence and judicial integrity, free from outside interference of any kind.

The U.S. contributed almost $2 million to the ECCC in fiscal year 2008 funding and $5 million in fiscal year 2010 funding. The installment announced today is a part of the projected $5 million in fiscal year 2011 funding.

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Cross References

Crimes committed against women in conflict zones, **Chapter 6.B.2.c.**
Iran designated as jurisdiction of primary money laundering concern, **Chapter 16.A.2.b.(1)(ii)**
Sanctions for transnational criminal organizations, **Chapter 16.A.7**
Atrocities prevention, **Chapter 17.C.1.**
U.S. policy against transferring detainees to countries where it is determined they are more likely than not to be tortured, **Chapter 18.A.3.c.(2)**